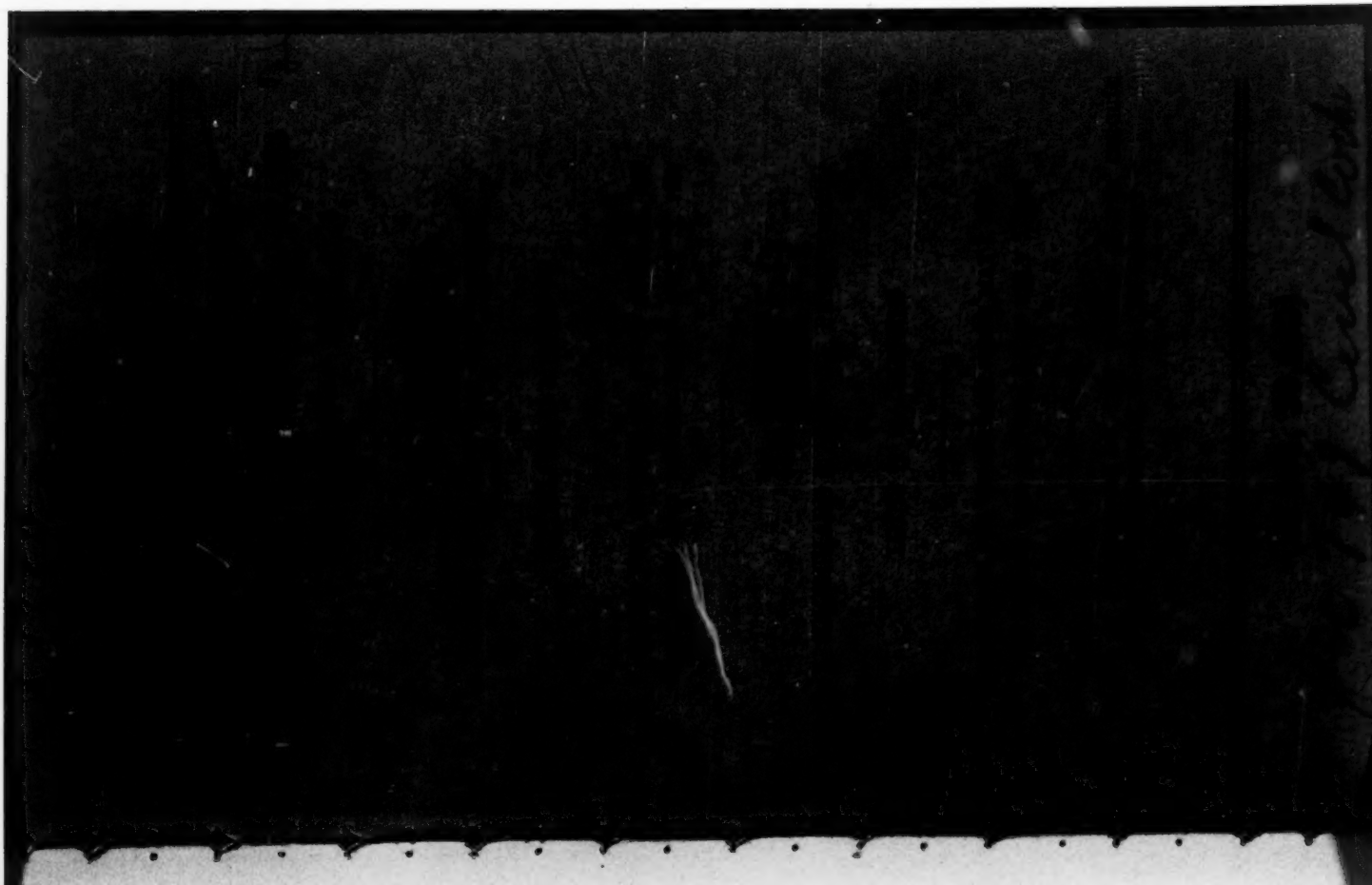

(29,591, 29,602)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 316

LOUIS B. MACKENZIE, PETITIONER,

vs.

A. ENGELHARD & SONS CO.

No. 321

A. ENGELHARD & SONS CO., PETITIONER,

vs.

LOUIS B. MACKENZIE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1923

[fol. 1] [Caption omitted]

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE

No. 58

LOUIS B. MACKENZIE, Plaintiff,

vs.

A. ENGELHARD & SONS COMPANY, Defendant

PETITION IN EQUITY—Filed July 3, 1919

The plaintiff, Louis B. Mackenzie, says:

1. The plaintiff, Louis B. Mackenzie (hereafter called Mackenzie), is a citizen of the State of Illinois and is an inhabitant of the Eastern Division of the Northern District of Illinois, and resides in the City of Chicago in that State; and the defendant A. Engelhard & Sons Company (hereafter called Engelhard Co.) is a corporation created, organized and existing under the laws of the State of Kentucky, is a citizen of the State of Kentucky, and is an inhabitant of the Western District of Kentucky, and has its residence and principal place of business in Louisville in that State.

[fol. 2] 2. This is a suit of a civil nature in equity and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000) Dollars, and it is between citizens of different States.

3. By a promissory note dated July 25, 1911, which they signed, executed and delivered, F. W. R. Eschmann and E. A. Eschmann agreed and promised to pay on or before 30 days after said date to E. F. Dunstan or order, Seventy Five Hundred ($7,500) Dollars, with interest at the rate of 6 per cent per annum, and as collateral security for the payment of said notes pledged thereon a certificate of stock No. 24 for 130 shares of the capital stock of the defendant herein, Engelhard Co. By proper endorsement the said note and the said collateral were assigned and delivered to and became the property of the plaintiff, Louis B. Mackenzie.

4. On March 10, 1913, Mackenzie filed suit No. 78411 at Louisville, Ky., in the Jefferson Circuit Court, Chancery Branch, Second Division (a Court of general equity jurisdiction), entitled Louis B. Mackenzie v. F. W. R. Eschmann, seeking to recover judgment upon the said note and to secure the payment thereof and the enforce-

ment of the lien upon the said pledged stock, in which suit F. W. R. Eschmann entered his appearance, and such proceedings were had therein that a judgment was rendered by the lower court on October 31, 1914, dismissing the petition and requiring Mackenzie to surrender to Eschmann the said certificate for 130 shares of stock pledged as collateral security on the note and in pursuance to such judgment Mackenzie did so surrender the said certificate to Eschmann.

5. Mackenzie appealed from the judgment to the Court of Appeals of Kentucky, and such proceedings were had therein that the judgment was reversed pursuant to an opinion delivered March 6, 1917, entitled Mackenzie v. Eschmann's executors, 174 Ky. 450 (Eschmann having died pending the appeal and the suit having been revived in the Court of Appeals against his executors (who entered their appearance therein), and the case was remanded to the lower court with directions to enter a judgment in conformity with that opinion. In pursuance to such mandate, the Jefferson Circuit Court did on October 31, 1917, enter a final judgment, a copy whereof is filed herewith as part hereof, marked "Exhibit 1," wherein, among other things, it was ordered, adjudged and decreed that the former judgment of October 31, 1914, be vacated, set aside and held for naught; that Mackenzie should recover of the estate of Eschmann [fol. 3] and from Eschman's executors, the sum of Seventy Five Hundred ($7,500) Dollars with interest at the rate of 6 per cent from June 25, 1911, and the further sum of $29.60 costs; that Mackenzie had a lien upon the said certificate No. 24 for 130 shares of the capital stock of the Engelhard Co., and upon any certificate or certificates which may have been or may thereafter be issued by the Engelhard Co. to Eschmann's executors in lieu of the said original certificate, and that Mackenzie has a lien upon the 130 shares of stock in the Engelhard Co. to secure the payment of the judgment therein rendered; that to satisfy the plaintiff's judgment the said 130 shares of stock should be sold at public auction by the Commissioner of said Court, free of all liens, and that the proceeds of such sale should be first applied to the satisfaction of Mackenzie's judgment, interest and costs; and that the Executors of said Eschmann, to wit; Edgar A. Eschmann and Bettina F. Eschmann should return to the Court the said certificate No. 24 for the 130 shares of stock in the Engelhard Co.

Eschmann's executors did not return to the Court the said certificate.

6. Pursuant to that decree, the Commissioner of the Jefferson Court on July 15, 1918, offered the said 130 shares of stock for sale at public auction to the highest and best bidder at the Court House door in Louisville, Jefferson County, Ky.; and one R. A. McDowell, an attorney at law, who had as such attorney represented Eschmann, Eschmann's Executors and the Engelhard Co. in said suit both in the lower court and in the Court of Appeals, appeared at the sale and stated to the assembled bidders that the certificate No. 24 for the 130 shares of stock referred to in the Court's judgment

and advertisement of sale, had been cancelled, as the stock had been sold by Eschmann during his lifetime, and that there was no stock in the Engelhard Co. standing in the name of Eschmann's Executors or either of them, and that the said certificate No. 24 was not then in existence, having been cancelled in the life-time of Eschmann; and thereby dissuaded persons from bidding at the said sale, and Mackenzie was the highest and best bidder and became the purchaser of the said stock.

The Commissioner of the Jefferson Circuit Court reported the sale to the Jefferson Circuit Court and such proceedings were further had therein that the report of sale was confirmed on Oct. 30, 1918, and the Commissioner was ordered to execute and deliver to Mackenzie a bill of sale evidencing the purchase by Mackenzie of said [fol. 4] 130 shares of stock; and in pursuance thereto, a bill of sale dated December 7, 1918, a copy of which is filed herewith as part hereof, marked "Exhibit 2," was signed, executed and delivered by the Commissioner of the Jefferson Circuit Court, examined and approved by the said Court and the Judge thereof, and delivered to Mackenzie, selling, assigning and transferring to Mackenzie, the said 130 shares of the capital stock of A. Englehard & Co. theretofore described by and evidenced by said certificate No. 124, or by any certificate or certificates which may have been or may thereafter be issued by the Engelhard Co. to Eschmann's Executors in lieu of the original.

The said judgment, orders and other proceedings in the Jefferson Circuit Court have never been modified, appealed from, or superseded, and have always been and still are in full force and effect.

7. On or about December 10, 1912, and before the filing of the original suit by Mackenzie against Eschmann in the Jefferson Circuit Court, Mackenzie notified the Engelhard Co. that Mackenzie held said certificate No. 24 as pledgee to secure the payment of said Seventy Five Hundred ($7,500) Dollars note; and the Engelhard Co. was made a party defendant to the suit in the Jefferson Circuit Court and was fully advised of Mackenzie's title and claim to the said stock and the certificate therefor, and was kept so advised throughout the progress of the litigation both in the lower court and in the Court of Appeals.

Eschmann's executors did not return to the Jefferson Circuit Court the said certificate No. 24; and on April 29, 1919, Mackenzie delivered to the defendant, Engelhard Co., a certified copy of the said bill of sale executed by the Commissioner of the Jefferson Circuit Court, and demanded that the Engelhard Co. deliver to Mackenzie the said certificate No. 24, or a new certificate for 130 shares of the capital stock of the Engelhard Co., but the Engelhard Co. refused to deliver to Mackenzie the said original certificate No. 24 or any certificate for 130 shares of the capital stock of the Engelhard Co. or any stock thereof.

The Engelhard Co. now has, and for many years heretofore has had a large and prosperous business in Kentucky, and the 130 shares of stock thereof is worth at least $13,000. Mackenzie is now and

always has been since the entry of the final decree affirming the said judicial sale, the owner of said certificate No. 24 and the 130 shares of stock represented thereby.

[fol. 5] Wherefore the plaintiff, Louis B. Mackenzie prays as follows, to wit:

1. That the defendant A. Englehard & Sons Co. be ordered adjudged and decre-d forthwith to deliver to the plaintiff, Mackenzie, a certificate made out in the name of Louis B. Mackenzie certifying that he is the owner of 130 shares of the capital stock of the A. Engelhard & Sons Co.

2. Or in the event that the said stock has been re-issued by A. Engelhard & Sons Co. to some other person and therefore a new certificate cannot lawfully be issued to the plaintiff, then and in such event that the Court shall ascertain the value of the said stock and order, adjudge and decree that the defendant, A. Engelhard & Sons Co. pay to the plaintiff, Louis B. Mackenzie the value of the stock as so ascertained with the amount of the dividends, if any, declared thereon since July 15, 1918.

3. For its costs herein expended and all general and proper relief.

May it please your honors to grant unto the plaintiff a writ of subpœna to be directed to the said A. Engelhard & Sons Co., the defendant hereinbefore named, requiring and commanding it to appear herein and answer, but not under oath, answer under oath being hereby expressly waived, the several allegations in this petition contained.

Bruce and Bullitt, King, Brower & Hurlburt, Counsel for Plaintiff.

[For convenience the following Exhibits filed with the petition are not printed at this point, but are printed in chronological order with other Exhibits at page 26, infra.

Exhibit 1. Final Judgment of the Jefferson Circuit Court entered Oct. 31, 1917 (p. 36, infra).

Exhibit 2. Bill of Sale executed December 7, 1918, by the Commissioner of the Jefferson Circuit Court, pursuant to said Final Judgment (p. 38, infra).]

[fol. 6] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed July 23, 1919

Come- the defendant, A. Engelhard & Sons Company by counsel and moves the Court to dismiss the petition of the plaintiff, Louis B. Mackenzie, because the facts therein stated are not sufficient to constitute a valid cause of action in equity.

R. A. McDowell, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO DISMISS—Filed May 27, 1920

The requisite diversity of citizenship existing and the amount in controversy exceeding the sum or value of $3,000 exclusive of interest and costs, this suit was brought by the plaintiff upon allegations of fact in his bill substantially as follows:

In July 1911 F. W. R. Eschmann and E. A. Eschmann, by their note payable thirty days after date, promised to pay to E. F. Dunstan or order $7,500 with interest, and as security for the payment of the note pledged Certificate No. 24 for 130 shares of the capital stock of the defendant. This certificate by proper endorsement was thereupon assigned and delivered to the plaintiff.

On March 10, 1913, plaintiff filed an action in the Jefferson Circuit Court against F. W. R. Eschmann seeking to recover judgment upon the note and the enforcement of the lien upon the pledged stock. Eschmann entered his appearance in that suit and such proceedings were had that a judgment was rendered on October 31, 1914, dismissing the plaintiff's petition and requiring plaintiff to surrender to Eschmann the certificate of stock so pledged to plaintiff. Pursuant to that judgment Mackenzie did surrender the certificate to Eschmann.

Plaintiff, however, appealed from that judgment to the Court of [fol. 7] Appeals, and that court, in March 1917, reversed the judgment of the Jefferson Circuit Court, and remanded the case to the latter court with directions to enter a judgment in conformity with the opinion of the Court of Appeals. Pursuant to that mandate the Circuit Court did, on October 31, 1917, enter a final judgment as directed. By that judgment plaintiff recovered from Eschmann's executors (Eschmann having died) the sum of $75,000 evidenced by the note sue- on, together with interest thereon and costs.

Pursuant to the ruling of the Court of Appeals the Jefferson Circuit Court also adjudged that plaintiff had a lien upon said Certificate No. 24 for 130 shares of the capital stock of the defendant, and also upon any certificate or certificates which might have been or might thereafter be issued by the defendant to Eschmann's executors in lieu of the original certificate and a lien upon said 130 shares of stock to secure the payment of the amount adjudged.

The judgment of the Jefferson Circuit Court also directed that to enforce said judgment and to satisfy the plaintiff's lien the 130 shares of stock should be sold at public auction by the proper officer of the court free of all liens, and that the proceeds of the sale should be applied to the satisfaction of the plaintiff's judgment, interest and costs, and further required the executor of Eschmann to return to the court the said Certificate No. 24 for the 130 shares of stock in defendant company. This return Eschmann's executors did not make.

Pursuant to the judgment of the Jefferson Circuit Court the proper officer offered the 130 shares of stock for sale at public auction in

due course. When this was done, R. A. McDowell, the attorney for Eschmann, stated to the Bidders assembled that Certificate No. 24 for the 130 shares of stock referred to in the judgment and advertisement of sale had been cancelled, as the stock had been sold by Eschmann during his lifetime, that there was no stock in the Engelhard Company in the name of Eschmann or his executors, and that Certificate No. 24 was not then in existence, having been cancelled. He thereupon forbade bidders to bid at the sale, and plaintiff under those circumstances became the purchaser of the right to the 130 shares of stock which had been pledged for the security of the indebtedness to him. Mr. McDowell does not appear to have stated who then held the 130 shares, and certainly did not state that the defendant did not control it, nor that the defendant, who knew all about the facts pertaining to the previous litigation, did not have [fol. 8] perfect knowledge and notice of all that had been done with that stock.

A report of the sale was made to the Jefferson Circuit Court. This report was confirmed by the Court, and a bill of sale for the 130 shares, under the judgment of the court, was executed by its commissioner and delivered by him to the plaintiff.

In December 1912, and before the filing of the original suit, plaintiff notified the defendant, Engelhard Company, that he held Certificate No. 24 as the pledgee to secure the payment of said debt due him, and furthermore the Engelhard Company was made a defendant in the suit in the Jefferson Circuit Court, and thereby was kept perfectly advised of all the proceedings therein.

The bill of complaint then avers that Eschmann's executors did not return to the Jefferson Circuit Court said Certificate No. 24; that on April 29, 1919, plaintiff delivered to the defendant Engelhard Company a certified copy of the bill of sale executed by the Commissioner of the Jefferson Circuit Court, and demanded that the defendant deliver to the plaintiff said Certificate No. 24 or a new certificate for 130 shares of the capital stock of the defendant, but that it refused to deliver to the plaintiff either said original Certificate No. 24 or any certificate covering any part of the capital stock of the defendant.

The allegations of the bill being taken as true, careful consideration of the arguments of defendant's counsel has not enabled us to see why some account of what has been done with the 130 shares of stock should not be given by an answer to the Bill. Prima facie the plaintiff has suffered a wrongful deprivation of his stock, and this could not have occurred without the co-operative action of the defendant in issuing a later certificate with full knowledge of the plaintiff's superior rights. Defendant knew not only of the pledge to plaintiff but of the judgment of reversal whereby that stock was determined by the judgment of the Court of Appeals to belong to the plaintiff as pledgee. Besides it was adjudged to be sold to pay the debt for which it was pledged.

True it is that under compulsion of the judgment of the Jefferson Circuit Court the certificate of stock was surrendered to Eschmann, but the effect of all that, as defendant must have known, was

most probably undone by the judgment of the Court of Appeals, under which the real title to the stock remained in plaintiff, as defendant must also have known or at all events is chargeable with sufficient knowledge to put it upon its guard. Indeed it would seem that the defendant must have issued to some one else a certificate for [fol. 9] the 130 shares. It might have thus become liable to the plaintiff unless some lawful defense of its conduct in respect to such issuing of the stock can be established.

Respecting the defendant's argument in support of the motion to dismiss it may suffice to say, first, that while Mr. McDowell's statement at the Commissioner's sale might have given notice to outsiders, it in no possible way adversely affected the rights of the plaintiff. Second, that no certificate for the stock was ever issued to the plaintiff is not a fact which in any way would relieve defendant from any liability to the plaintiff. The failure to issue the stock, indeed, may be the principal factor in establishing the plaintiff's claim. Third, the court finds itself unable to yield to the argument that the Jefferson Circuit Court and the Court of Appeals of Kentucky did not have jurisdiction over the subject-matter of the action when those courts respectively rendered their judgments.

At all events, without feeling the necessity of going into more detail, the court is clearly of opinion that the bill of complaint requires an answer, and that the motion to dismiss it should be and it is overruled.

Walter Evans, Judge. May 27, 1920.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 2, 1920

The defendant, A. Engelhard & Sons Company, for answer to plaintiff's bill of complaint, denies the allegation in the third paragraph that certificate No. 24 for 130 shares of the capital stock of this defendant was endorsed and assigned to the plaintiff, Louis B. Mackenzie.

Defendant denies that the judgment of the Jefferson Circuit Court was entered pursuant to the opinion of the Court of Appeals of Kentucky insofar as it granted a lien to the plaintiff, Mackenzie, [fol. 10] and denies that the Court of Appeals of Kentucky directed the Jefferson Circuit Court to enter a judgment granting a lien to said Mackenzie as alleged in Paragraph 5 of said bill. Defendant denies that the Commissioner of the Jefferson Circuit Court offered the said 130 shares of stock for sale on July 15th, 1918.

Defendant says that the statements alleged in Paragraph 6 of said bill as having been made by R. A. McDowell at the alleged sale on July 15th, 1918, were true, and that the certificate No. 24 for 130 shares of stock referred to in the Court's judgment had been cancelled, and that the stock had been sold by F. W. R. Eschmann during his lifetime, and that there was no stock in the Engelhard

Company standing in the name of Eschmann's Executors or either of them, and that the said certificate No. 24 was not then in existence, and that it had been cancelled in the lifetime of said Eschmann, and defendant says that no certificate was theretofore or thereafter issued to the Executors of F. W. R. Eschmann or either of them by the defendant company, for stock therein.

Defendant, A. Engelhard & Sons Company, says that it was made a party defendant to the suit in the Jefferson Circuit Court as alleged by plaintiff in Paragraph 7 of his bill, but that immediately thereafter the Court sustained his demurrer to plaintiff's petition and dismissed this defendant as a party to said suit, and that the defendant was not thereafter a party in any action either in the Jefferson Circuit Court, or the Court of Appeals of Kentucky with reference to said stock.

Paragraph II. Further answering the bill of complaint by the plaintiff herein, the defendant, A. Engelhard & Sons Company, says that the plaintiff, Louis B. Mackenzie on or about December 10th, 1912, and before said Mackenzie filed his original action in the Jefferson Circuit Court against F. W. R. Eschmann, presented to this defendant at its office, certificate No. 24 for 130 shares of stock of this defendant, and demanded that said stock be transferred to said Mackenzie. Defendant says that it declined to make such transfer because upon examination it found that said certificate No. 24 stood in the name of F. W. R. Eschmann, and said certificate which was presented by Mackenzie did not bear the endorsement and was not endorsed by the said F. W. R. Eschmann; that when the plaintiff, Mackenzie filed his said suit against F. W. R. Esch-[fol. 11] mann, he made this defendant a party defendant therein, but the Court dismissed the action insofar as this defendant was concerned.

Defendant says that later about November —, 1914, F. W. R. Eschmann presented said certicate No. 24 to the defendant herein and directed the defendant to issue a certificate for said 130 shares of stock in lieu of said certificate No. 24, as said Eschmann had sold his said stock. Upon examination of said certificate, the defendant found that the certificate was duly endorsed by F. W. R. Eschmann, and thereupon defendant cancelled certificate No. 24 and issued a new certificate as directed by said Eschmann; that since said November —, 1914, the said F. W. R. Eschmann had not been the holder or owner of any stock in defendant company; that said certificate No. 24 has not been in existence but was cancelled, and that no stock or certificate therefor was at any time issued to or in the name of the Executors of F. W. R. Eschmann or either of them, or in the name of F. W. R. Eschmann.

Defendant says that when the plaintiff Mackenzie on April 29th, 1919, demanded that the defendant deliver to said Mackenzie a certificate for 130 shares of the capital stock of said defendant company, that the said Mackenzie did not present to this defendant any certificate of stock in said defendant company to be transferred, but presented and tendered to the defendant a certified copy of a bill

of sale, which bill of sale or a copy thereof is filed with the plaintiff's bill of complaint purporting to convey to Louis B. Mackenzie 130 shares of stock "evidenced by certificate No. 24 or by any certificates or certificate which may have been or may hereatfer be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of certificates No. 24"; and defendant says that said certificate No 24 was not in existence, having been cancelled during the lifetime of F. W. R. Eschmann, and that no certificate had theretofore or has since been issued by A. Engelhard & Sons Company the defendant herein, to Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, or either of them, in lieu of said certificate No. 24 or at all, and said Louis B. Mackenzie knew at the time said facts were true.

Said Louis B. Mackenzie the plaintiff herein also knew that said 130 shares of stock of the defendant A. Engelhard & Sons Company was of the value of at least Thirteen Thousand ($13,000.00) Dollars, [fol. 12] as alleged in his bill of complaint, but because Mackenzie knew that certificate No. 24 had been cancelled and that no stock stood in the name of Eschmann's Executors, or either of them, the plaintiff Mackenzie bid at the Commissioner's sale One Hundred ($100.00) Dollars and no more, which was the only consideration as shown in the copy of the Commissioner's bill of sale filed as "Exhibit 2" with plaintiff's bill of complaint herein.

Defendant says that all of its capital stock has been issued and is outstanding and that no part thereof is issued to F. W. R. Eschmann, or his estate or anyone representing him or his estate, or for the benefit of him or his estate, and that said F. W. R. Eschmann, his estate, nor his Executors own any stock in the defendant A. Engelhand & Sons Company.

Defendant further says that by reason of the judgment entered by the Jefferson Circuit Court, pursuant to the opinion of the Court of Appeals of Kentucky, the plaintiff Mackenzie secured a judgment against Edgar A. Eschmann and Bettina E. Eschmann, as Executors of the estate of F. W. R. Eschmann, deceased, for the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, being the amount of said note with interest from its date, and that the plaintiff, Mackenzie, has filed proof of his claim, the said judgment, with said Executors of the estate of said F. W. R. Eschmann, and that said estate has not yet been settled, and the claim of said Mackenzie is still pending against said estate.

Wherefore, having fully answered, the defendant prays that the plaintiff's bill be dismissed; for its costs herein expended, and for all proper relief.

R. A. McDowell, Attorney for Defendant.

[fol. 13] IN UNITED STATES DISTRICT COURT

MOTION—Filed Oct. 5, 1920

The plaintiff, Louis B. Mackenzie, moves the Court to strike out Paragraph Two of the defendant's answer herein, because the same is insufficient and does not state facts constituting a defense to the cause of action.

Wm. Marshall Bullitt, Attorney for the Plaintiff.

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO DISMISS PARAGRAPH TWO OF THE ANSWER—Filed Oct. 11, 1920

In an opinion delivered in this case on a motion to dismiss the Bill we endeavored to state clearly the situation, or rather the facts, as they then appeared. This will save the need of any repetition of what was then stated. The defendant filed an answer in two paragraphs. The first denied many of the material allegations of the Bill and the second set up defendants affirmative defense. The plaintiff has moved to dismiss that paragraph of the Answer.

In disposing of this motion we can not say that our view is perfectly satisfactory to ourselves, but we give the benefit of the doubt to the defendant and against a dismissal without a trial on the merits of that particular phase of the case.

The defendant, speaking generally, says that the plaintiff, on or about December 10th, 1912, and before plaintiff filed his original action in the Jefferson Circuit Court against Eschman, presented to the defendant at its office Certificate No. 24 and demanded that the stock therein described be transferred to him, but that it was not done because the certificate was not endorsed by Eschman, the person named therein. It avers that later, about November 1914, Eschman presented said Certificate No. 24 to defendant and directed it to issue a certificate for the 130 shares in lieu of Certificate No. [fol. 14] 24, as said Eschman has sold his said stock, and that upon examination of said certificate the defendant found that it had been duly endorsed by Eschman, and thereupon defendant cancelled it and issued a new certificate as directed by Eschman, and that since November 1914 the said Eschman has not been the holder or owner of any stock in said company, and that said Certificate No. 24 since that date has not been in existence.

It will be observed that in this statement the defendant does not say to whom this certificate was issued nor who is now the holder of the shares. It may be a matter for consideration whether this is sufficiently definite, and whether or not the court under Equity Rule 20 should not, on its own motion, require it to be made more definite. However, for the present that will be passed over.

Other statements are made in the second paragraph which, if undenied, might more or less affect the equities of the case. In

this situation and in order that there may be a full and careful presentation of all the facts, the court is not disposed to sustain the motion to dismiss the 2nd paragraph.

Notwithstanding the court's doubts as at first expressed it is conceived to be better to have a full and thorough investigation of the facts to ascertain whether there is any equitable support to the defense set up in this paragraph. Of course in disposing of this motion we do not go back to the Bill of Complaint nor to the opinion referred to, as, upon this motion, they can not be permitted to be influential.

The judgment of the court will be that the motion to dismiss the second paragraph of the Bill should be and it is overruled.

Oct. 11th, 1920.

Walter Evans, Judge.

[fol. 15] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed March 30, 1921

Paragraph One. Comes the defendant, A. Engelhard & Sons Company, and by leave of Court amends its answer herein, and for amendment to the first paragraph thereof, denies that it was advised that the plaintiff Mackenzie had any title to said stock or to the certificate therefor, and denies that it was kept so advised throughout the progress of the litigation either in the lower Court or in the Court of Appeals of Kentucky, or at all.

Paragraph Two. For amendment to Paragraph Two of its answer herein, the defendant substitutes this amendment for and in lieu of Paragraph Two of its original answer herein, and says that on or about December 10th, 1912, and before said Mackenzie had filed action #78,411 in the Jefferson Circuit Court, entitled Louis B. Mackenzie vs. F. W. R. Eschmann et al., the said Louis B. Mackenzie presented to this defendant at its office Certificate No. 24 for 130 shares of the capital stock of the defendant, A. Engelhard & Sons Company, standing in the name of F. W. R. Eschmann on the books of said Company, and demanded that said stock be transferred to said Mackenzie.

Defendant says that said Certificate No. 24 which was presented to this defendant by Mackenzie, was not endorsed by F. W. R. Eschmann in whose name it stood, and bore no endorsement of said F. W. R. Eschmann, and that no power of attorney authorizing such transfer, executed by said Eschmann was presented with said certificate and demand; that when the plaintiff Mackenzie filed his said suit #78,411 in the Jefferson Circuit Court against F. W. R. Eschmann et al., on March 10th, 1913, he made this defendant, A. Engelhard & Sons Company a party defendant therein, but upon demurrer filed by this defendant, the Jefferson Circuit Court dismissed the action on the 7th day of June, 1913, insofar as this defendant was concerned, and this defendant was never thereafter a party to said suit.

The defendant herein says that in said action #78,411 of Mackenzie vs. Eschmann et al., in the Jefferson Circuit Court, said Court entered a judgment on the 7th day of November, 1914, which is recorded in Judgment Book 37 page 509 of said Court, wherein it provided as follows, to-wit:

"It is further considered and adjudged that the defendant, F. W. [fol. 16] R. Eschmann be and he is hereby permitted to withdraw from the papers in the case, the certificate for 130 shares of the capital stock of A. Engelhard & Sons Company filed herein as an exhibit, leaving a copy thereof in the record."

A certified copy of said judgment is filed herewith, made a part hereof and marked "Exhibit Judgment."

The defendant, A. Engelhard & Sons Company says that the plaintiff, Louis B. Mackenzie did not supersede the said judgment, insofar as it permitted the defendant Eschmann to withdraw said certificate of stock from the papers in Court, and failed to execute a supersedeas bond with respect thereto.

Defendant says that pursuant to said judgment of the Court, the defendant, F. W. R. Eschmann did withdraw said certificate of stock from the papers on the— day of January, 1915.

Defendant says that later, on or about the 20th day of February, 1915, F. W. R. Eschmann presented said Certificate No. 24 for 130 shares of stock in this defendant corporation, to the defendant herein and directed the defendant to issue a certificate or certificates in lieu of said certificate No. 24 for 130 shares of said stock.

Defendant says that said certificate was accompanied by a power of attorney executed by said F. W. R. Eschmann, whereby this defendant was directed to transfer said stock, and thereupon this defendant cancelled said certificate No. 24, standing in the name of said F. W. R. Eschmann, and issued new certificates in lieu thereof as directed by said Eschmann; that since said transfer on the 20th day of February, 1915, the said F. W. R. Eschmann has not been the holder or owner of any stock in the defendant, A. Engelhard & Sons Company; that said Certificate No. 24 has not been in existence, but was at that time cancelled, and that no stock or certificate therefor was issued at that time or since to or in the name of Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, or either of them, or in the name of F. W. R. Eschmann, and that no stock has been owned or held by said F. W. R. Eschmann or by his executors or by anyone for him or on his account or for account of him or his estate.

Defendant says that at the time of said transfer of said Certificate No. 24 on the 20th day of February, 1915, as directed by said F. W. R. Eschmann, the plaintiff, Louis B. Mackenzie had not perfected an appeal to the Court of Appeals from the judgment entered in said action #78,411, but that after said transfer on the 20th day of [fol. 17] February, 1915, and in the month of April, 1915, the said Louis B. Mackenzie perfected an appeal from said judgment in the Court of Appeals of Kentucky, but failed to supersede said judgment from which he appealed and which permitted Eschmann to withdraw said certificate.

Defendant says that four years after said Certificate No. 24 had been withdrawn from the Court, pursuant to said judgment, and transferred as aforesaid, that the plaintiff, Louis B. Mackenzie on the 29th day of April, 1919, demanded that the defendant, A. Engelhard & Sons Company deliver to said Mackenzie, a certificate for 130 shares of the capital stock of said defendant; that said Mackenzie did not present to this defendant any certificate of stock in said defendant Company to be transferred to him, but presented and offered to this defendant a certified copy of a bill of sale, which bill of sale or copy thereof is filed with the plaintiff's bill of complaint marked "Exhibit No. 2," purporting to convey to Louis B. Mackenzie 130 shares of the capital stock of this defendant, and that said bill of sales recites as follows:

"The undersigned, Eustace L. Williams, Commissioner of the Jefferson Circuit Court, for and on behalf of the parties of the first part, do hereby convey to the second party hereto, Louis B. Mackenzie, the said 130 shares of the capital stock of A. Engelhard & Sons Company hereinabove described and evidence by Certificate No. 24 or by any certificate or certificates which may have been or may hereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24."

Defendant says that it declined to issue any certificate to said Louis B. Mackenzie upon such demand, and informed said Mackenzie (and it was and is a fact), that said Certificate No. 24 was not then in existence; that it had been cancelled on February 25th, 1915, during the lifetime and upon the direction of F. W. R. Eschmann, the holder and owner thereof, and that no certificate had theretofore been issued by defendant, A. Engelhard & Sons Company to the said Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, or to either of them in lieu of said Certificate No. 24 or at all, and it says that no such certificate has been issued since.

[fol. 18] Defendant says that all of its capital stock which it is authorized by law to issue, has been issued and is outstanding, and had been issued and was outstanding at the time of said demand, and that no part thereof is issued to F. W. R. Eschmann or to his executors, or to his estate, or to anyone representing him or his estate, or for the benefit of him or his estate, and that neither F. W. R. Eschmann, his estate or his executors own any stock in the defendant, A. Engelhard & Sons Company, nor is any such stock held for the benefit of said Eschmann or his estate or his executors; that this defendant is not authorized by law or by its Charter to issue and cannot issue and could not issue at the time of said demand, any further certificate or certificates representing its capital stock.

Paragraph Three. Defendant, A. Engelhard & Sons Company, says that when stock Certificate No. 24 for 130 shares of the capital stock of said defendant, A. Engelhard & Sons Company was withdrawn from Court by the defendant, F. W. R. Eschmann, pursuant to said

judgment entered November 7th, 1914, in the Jefferson Circuit Court, in action #78,411, styled Mackenzie vs. Eschmann, which judgment is hereinabove filed with this answer, marked "Exhibit Judgment," which judgment was not superseded by the plaintiff; that said Court gave up the possession, custody and control of said stock and certificate, and released all possession, custody and control thereof to the defendant; that the said Court never thereafter acquired possession, custody or control of said stock or certificate, and that after the said judgment entered November 7th, 1914, was reversed by the Court of Appeals, and when the Jefferson Circuit Court entered its second judgment under date of October 31st, 1917, said Court had no jurisdiction of said stock or certificate, and said judgment insofar as it attempted to grant a lien on said stock, order a sale thereof and order a return of said certificate to Court was void and of no effect, because the subject matter thereof was not in the possession or under the control or jurisdiction of said Court, and was not subject to or affected by any order or judgment of said Court with reference thereto.

Defendant, A. Engelhard & Sons Company, says that it was not a party to said action in the Jefferson Circuit Court, #78,411, from and after June 7th, 1913, at which time said Court entered an order dismissing the petition of the plaintiff as against this defendant, and [fol. 19] it was not a party thereto when said judgment was entered on October 31st, 1917, which judgment is set up with plaintiff's petition or at the time of the Commissioner's sale thereunder or at any time after said June 7th, 1913, and this defendant had no right to object to or appeal from said judgment entered in said action #78,411 and was not bound thereby.

R. A. McDowell, Attorney for Defendant.

[For convenience "Exhibit Judgment" filed with the Amended Answer is not printed at this point but is printed in chronological order with the other Exhibits at p. 30, infra.

"Exhibit Judgment"—original judgment of the Jefferson Circuit Court entered November 7, 1914* (p. 30, infra).]

IN THE UNITED STATES DISTRICT COURT

STIPULATION OF AGREED FACTS—Filed March 30, 1921

For the purpose of avoiding the necessity of taking proof herein, it is agreed between the parties hereto as follows, to-wit:

1. Louis B. Mackenzie, is a citizen of and resides in the city of Chicago, County of Cook, and State of Illinois.

A. Englehard & Sons Company, is a corporation, created, organized and existing under the laws of the State of Kentucky; is a citizen of the State of Kentucky, and has its residence and principal place of business in Louisville, in that State.

*Erroneously described in the petition and final judgment as having been entered Oct. 31, 1914.

The amount in controversy herein, is exclusive of interest and costs [fol. 20] of the value of more than Three Thousand ($3,000.00) Dollars.

In case the Court should enter a decree in favor of plaintiff, and the Court should find that the A. Engelhard & Sons Company has disabled itself from issuing to plaintiff any of the shares of stock claimed by complainant, further evidence shall be taken as to the value of such stock.

2. Louis B. Mackenzie, presented to A. Engelhard & Sons Company, on or about December 10th, 1912,

(a) Stock certificate #24 of the A. Engelhard & Sons Company, which certificate reads as follows:

"This certifies that F. W. R. Eschmann is entitled to 130 shares of the capital stock of A. Engelhard & Sons Company, transferable only in person or by attorney on the books of the company, upon the surrender and proper endorsement of this certificate."

which certificate bore no endorsement, and no power of attorney authorizing a transfer; together with,

(b) A promissory note dated July 25, 1911, signed, executed and delivered by F. W. R. Eschmann and E. A. Eschmann, wherein the said Eschmanns agreed and promised to pay $7,500.00 with interest at the rate of six per cent (6%) per annum, and which note recited that there was deposited therewith, as collateral security.

"Certificate of stock #24 for one hundred and thirty (130) shares of the capital stock of A. Engelhard & Sons Company."

3. Louis B. Mackenzie claimed that said note had become his property by endorsement and delivery of the note, together with the collateral therein described; and thereupon Louis B. Mackenzie demanded that A. Engelhard & Sons Company transfer the said 130 shares of stock, represented by said certificate, to Louis B. Mackenzie, as pledgee.

A. Engelhard & Sons Company declined to comply with Mackenzie's demand, and refused to transfer said stock as demanded by him.

4. On March 10th, 1913, Louis B. Mackenzie filed an action, #78,411, in the Jefferson Circuit Court, Kentucky, against F. W. R. Eschmann, A. Engelhard & Sons Company, et al., seeking to recover judgment upon said note, praying that he be adjudged a lien upon said stock, and praying for the enforcement of such lien against the said stock.

[fol. 21] 5. On June 7, 1913, the Jefferson Circuit Court sustained the demurrer of the defendant, A. Engelhard & Sons Company, to Mackenzie's petition, and dismissed the action in so far as said A. Engelhard & Sons Company was concerned, and A. Engelhard & Sons Company was never thereafter a party to said suit.

The Judge of the Jefferson Circuit Court, at the time he sustained said demurrer, and concurrently with the order sustaining the same, wrote upon the official wrapper containing said files, the following memorandum opinion:

"7th June, 1913.

Plaintiff alleges that he has possession of the certificate of stock; that it was delivered to him along with the note to secure which it was pledged. The note is in writing and is signed by the owner of the certificate of stock. In the body of the note is written the statement that the certificate is pledged. What more could be needed to make a pledge. Here is actual delivery of the certificate and a writing signed by the owner of the certificate and the fact that the shareholder did not write his name upon the certificate is of no importance in a court of equity. Plaintiff has a right to have his lien upon the certificate of stock enforced and he needs no attachment. His is a lien by contract. Engelhard & Sons Co. are not a party to the transaction and are unnecessary parties to the action. That corporation cannot be proceeded against until plaintiff becomes the owner of the certificate and a new certificate in his name is demanded by him and refused by Engelhard & Sons Co.

2. A. E. Eschmann has no interest in the property sought to be sold, is not served with process, and there is no attachment against his property if he has any in this jurisdiction.

General demurrer of Engelhard & Sons Co. sustained.

Special demurrer of E. A. Eschmann is sustained.

Special demurrer of F. W. R. Eschmann is overruled.

Kirby, J."

which has ever since remained in the files of this cause.

6. Such proceedings were had in said action #78411, in the Jefferson Circuit Court, that a judgment was entered on November 7, [fol. 22] 1914,* which is recorded in Judgment Book 37, Page 509, of said Court, and a true copy thereof is filed with the amended answer of the defendant herein, and a copy of the opinion of the lower Court rendered October 31, 1914 is filed herewith as part hereof.

Said judgment provided, in part, as follows:

"It is considered and adjudged by the Court, that the plaintiff recover nothing of the defendant, and that the petition of the plaintiff, Louis B. Mackenzie, be and it is hereby dismissed.

It is further considered and adjudged that the defendant, F. W. R. Eschmann, be and he is hereby permitted to withdraw from the papers in the case, the certificate for one hundred and thirty (130) shares of the capital stock of A. Engelhard & Sons Company filed herein as an exhibit, leaving a copy thereof in the record."

---

*Inadvertently described in the petition herein and in the judgment of reversal as having been entered on October 31, 1914.

7. Louis B. Mackenzie, prayed an appeal to the Court of Appeals of Kentucky, but did not supersede said judgment in so far as it permitted Eschmann to withdraw said certificate of stock from the Court, and executed no supersedeas bond with reference thereto.

8. The defendant therein, F. W. R. Eschmann, withdrew said certificate of stock from the papers in said Court, on or about January, 1915, and said certificate of stock has never been returned into the custody or possession of the Court since said withdrawal.

9. On or about February 20, 1915, F. W. R. Eschmann presented said certificate #24 to the defendant, A. Engelhard & Sons Company, with a power of attorney for the transfer for the stock, which power of attorney had been executed by F. W. R. Eschmann; the said F. W. R. Eschmann directed A. Engelhard & Sons Company to issue new certificates therefor in lieu of said certificate #24 for 130 shares of said stock; and the defendant, A. Engelhard & Sons Company, did then and there physically mark "Cancelled" said certificate #24, and pursuant to Eschmann's directions, issued new certificates for 130 shares of stock in lieu thereof, as follows:

(a) To R. A. McDowell, in payment of his fee in said suit, 25 shares, which were later sold by McDowell for $2,500.00 cash, and transferred to V. H. Engelhard by R. A. McDowell. R. A. McDowell [fol. 23] was the attorney of record for the defendants, F. W. R. Eschmann, Edgar A. Eschmann and A. Engelhard & Sons Company, in cause #78,411, in the Jefferson Circuit Court, Kentucky, and on the appeal of said cause to the Court of Appeals of Kentucky, was attorney of record for Bettina E. Eschmann and Edgar A. Eschmann, as Executrix and Executor respectively, of the estate of F. W. R. Eschmann, deceased.

V. H. Engelhard was a brother of Mrs. F. W. R. Eschmann, and on December 10, 1912, and thereafter, until the date of his death, to-wit: (subsequent to the date of the transfer of the 25 shares of the capital stock of A. Engelhard & Sons Company from R. A. McDowell to said V. H. Engelhard), the President and the executive head of said A. Engelhard & Sons Company, and was the person on whom the demand mentioned in Paragraph 3, supra, was made on December 10, 1912.

(b) To Bettina E. Eschmann, 105 shares which stand on the books in her name to-day, (issued in two certificates, one for 40 shares and one for 6 shares.) Said Bettina E. Eschmann was, at the date of said transfer, the wife of F. W. R. Eschmann, and now is Executrix of the estate of F. W. R. Eschmann, deceased.

F. W. R. Eschmann and Bettina E. Eschmann were on December 10, 1912, husband and wife, living together as such, and so continued until the death of F. W. R. Eschmann which occurred on or about April 26th, 1915. The fact of said relationship to each other and living together of said F. W. R. Eschmann and Bettina E. Eschmann during the period aforesaid was known to V. H. Engelhard.

F. W. R. Eschmann nowhere recorded any transfer or assignment of said 105 shares of stock of A. Engelhard & Sons Company to Bettina E. Eschmann, except on the corporate books of A. Engelhard & Sons Company.

Since said transfers, no part of said 130 shares of said stock has stood or now stands in the name of F. W. R. Eschmann, or his Executors, or either of them as such.

10. On April 26th, 1915, Louis B. Mackenzie perfected an appeal to the Court of Appeals of Kentucky from said judgment entered in the Jefferson Circuit Court of Kentucky, without superseding said judgment.

Thereafter, the defendant, F. W. R. Eschmann, died on April 26th, 1915, and the action was revived by Louis B. Mackenzie in said Court of Appeals against Eschmann's Executors, Bettina E. Eschmann and Edgar A. Eschmann.

On March 6, 1917, the Court of Appeals of Kentucky reversed said judgment entered in the Jefferson Circuit Court, as is shown [fol. 24] by an opinion of said Court of Appeals of Kentucky, entitled Mackenzie vs. Eschmann's Executors, 174 Ky. 450 filed herewith and remanded said case to the said Jefferson Circuit Court.

11. On October 31, 1917, the said Jefferson Circuit Court entered a final judgment, a copy of which is filed with plaintiff's petition, marked "Exhibit 1," wherein it was ordered that the former judgment of said Court, entered October 31, 1914, be vacated, set aside, and held for naught, and it provided,

(a) That the plaintiff, Mackenzie, should recover $7,500.00 with interest and costs, from the Executors of said F. W. R. Eschmann; and,

(b) That Mackenzie,

"Has a lien upon Certificate No. 24 of the capital stock of A. Engelhard & Sons Company, a corporation, for one hundred and thirty (130) shares of the capital stock in said Company, and upon any certificate or certificates which have been or may haereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24, and has a lien upon said one hundred and thirty (130) shares of stock represented by said certificate, said lien being to secure the plaintiff in the payment of the debt evidenced hereby and his costs herein."

Said judgment provided for a sale to enforce their said lien and also directed the Executors of the estate of F. W. R. Eschmann, deceased, to return said Certificate No. 24 for one hundred and thirty (130) shares of stock to the Court.

The said Executors have never returned said Certificate No. 24 to the Court, (and no step was taken by the plaintiff, Louis B. Mackenzie, in said action #78411, to compel them to do so.)

On July 15, 1918, and pursuant to said judgment, the Commissioner of the Jefferson Circuit Court, Kentucky, proceeded to hold a sale as directed by the Court, and R. A. McDowell, who had acted as the attorney of record for F. W. R. Eschmann, and for A. Engelhard & Sons Company, in case #78411, in the Jefferson Circuit Court, Kentucky, and who is now the attorney of record for the defendant herein, attended at said sale and publicly stated to all persons attending said sale that Certificate No. 24 for the 130 shares of stock referred to in the judgment and advertisement of sale had [fol. 25] been cancelled, as the stock had been transferred by Eschmann during his lifetime, and that there was no stock in the Engelhard Company in the name of Eschmann or his Executors, and that Certificate No. 24 was not then in existence, having been cancelled.

Louis B. Mackenzie, at said sale, on July 15th, 1918, bid One Hundred ($100.00) Dollars therefor, and was the highest bidder, after which said Commissioner reported to the Court a sale to Louis B. Mackenzie, and a conveyance to him of,

"The said one hundred and thirty (130) shares of capital stock of A. Engelhard & Sons Company hereinabove described, and evidenced by Certificate No. 24, or by any certificate or certificates which may have been or may hereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24."

The said report of sale was confirmed by the Jefferson Circuit Court, and on October 30, 1918, a Bill of Sale was ordered by the Court to be executed and delivered to Louis B. Mackenzie [illegible] was so executed and delivered to Mackenzie.

12. On April 29, 1919, Louis B. Mackenzie, presented to A. Englehard & Sons Company, a certified copy of the said Bill of Sale from the Jefferson Circuit Court, and demanded that it deliver to him a new certificate for 130 shares of its capital stock, but presented no certificate of stock in A. Engelhard & Sons Company.

A. Engelhard & Sons Company declined to issue to said Mackenzie any certificate of stock in response to his said demand. It is stated to said Mackenzie that said Certificate No. 24 had been cancelled on February 20th, 1915, by direction of F. W. R. Eschmann, during his lifetime, and that no stock stood in the name of the Executors of the estate of F. W. R. Eschmann, or either of them.

13. All of the capital stock of A. Engelhard & Sons Company that it is authorized by law to issue has been issued, and is outstanding, and certificates for all of said authorized stock had been issued and were outstanding at the time of said demand.

14. The following documents are genuine, and shall be used as evidence in this action:

[fol. 26] (1) Copy of the judgment of the Jefferson Circuit Court dated November 7, 1914, filed with the defendant's amended answer

and marked "Exhibit Judgment"; and copy of the Court's opinion filed therewith.

(2) The opinion of the Court of Appeals of Kentucky, delivered March 6th, 1917, Mackenzie vs. Eschmann's Executors, 174 Ky. 450, reversing the above judgment.

(3) Copy of the judgment of the Jefferson Circuit Court, rendered October 31, 1917, which is filed with plaintiff's petition, marked "Exhibit 1."

(4) Copy of the Bill of Sale of the Commissioner of the Jefferson Circuit Court, dated December 7th, 1918, and filed with the plaintiff's petition, marked "Exhibit 2."

Louis B. Mackenzie, By Wm. Marshall Bullitt, Attorney. A. Engelhard & Sons Company, By R. A. McDowell, Attorney.

IN UNITED STATES DISTRICT COURT

EXHIBIT IN EVIDENCE

OPINION OF THE JEFFERSON CIRCUIT COURT IN MACKENZIE V. ESCHMANN—Rendered October 31, 1914

This action was instituted by Louis B. McKenzie, against F. W. R. Eschman, E. A. Eschman, E. F. Dunstan, and H. L. Patterson, all of whom are non-residents of Kentucky. The plaintiff is the holder of a note for $7,500.00, in which F. W. R. and E. A. Eschman are the makers, E. F. Dunstan is the pavee and H. L. Patterson is the endorser. The note is dated 25th July, 1911, and made payable on or before thirty days after date, and to secure the [fol. 27] payment — one hundred and thirty shares of stock in a Kentucky Corporation was pledged as collateral. The corporation whose stock was pledged was made a defendant but its demurrer to the petition was sustained.

None of the defendants are before the court except F. W. R. Eschmann, the owner of the stock pledged.

The purpose of the action was to subject the shares of stock to the payment of the note, and, since F. W. R. Eschmann has made defense to secure personal judgment against him for whatever balance may remain due if the stock should not sell for enough to discharge the debt.

Among other contentions the defendant pleads that the note was procured from him by fraud, covin, and deceit, practiced by Patterson; that it is without consideration, that plaintiff is not a holder in due course for value, and that he, the plaintiff, had notice of the infirmities above mentioned.

The facts are substantially as follows: H. L. Patterson, of Chicago, was a large holder of stock in a corporation engaged in the business of publishing a magazine known as the American Educational Re-

view. He was the chief officer of the concern, and was actively and almost exclusively in charge of its business. F. W. R. Eschman, and his son, E. A. Eschman, resided in New York, where the younger Eschman had been employed in the business department of a concern which published a magazine. Young Eschman, and his friend, Dingwall, who had been soliciting advertisements for a magazine were seeking an opportunity to get into the business on their own account. They met Patterson who had recently opened a branch office in New York City, and after a brief acquaintance an arrangement was made by which Patterson was to take them into business with himself, in the publication of his magazine. This was to be accomplished by the young men buying a majority of the capital stock of the corporation which issued the publication. Neither of the young men had any money and it was proposed that Eschman's father, the defendant, help them provide the means. After some negotiations the defendant agreed to execute the note in controversy, and secure it by a pledge of his share of stock in the Kentucky Corporation, and later provide other funds necessary to effectuate the agreement. The exact amount of money, which the senior Eschman was to advance is not made clear, nor is it quite clear just what the agreement between E. A. Eschman, Dingwall, and Patterson was, but it is probably as related by Patterson, that is they were to [fol. 28] pay $15,000.00 cash and $10,000.00 in one year for a majority of the stock, Dingwall had nothing and the senior Eschman was short of funds, hence the resort to the short note with collateral security.

The note at the instance of Patterson, was made payable to one E. F. Dunstan, and that name appears to have been endorsed upon the note. Thereafter Patterson endorsed the note himself and taking it to Chicago transferred it to, or sold it to his friend, the plaintiff, McKenzie. Before the maturity of the note, and without advising the Eschmans that the note had been disposed of, Patterson drew on Eschman for $2,500.00, and his draft was paid. For a year after the note was executed, Patterson sought to have Eschman pay the note, or renew it, but the latter seems to have been unable or unwilling to pay and declined to renew the note. In the meantime, plaintiff kept the note, and not until more than a year after maturity he notified Eschman that he had bought the note and required payment. He, plaintiff, says that Patterson had been assuring him from time to time that Eschman was hard run, but would pay presently, and as Patterson was in communication with Eschman, and himself an endorser, he allowed the time to slip by, being assured by Patterson's representations, and confident of the value of the collateral attached to the note. None of the stock has ever been delivered, but is still held by Patterson.

Plaintiff testified that in August, 1911, and before the maturity of the note, Patterson told him of this transaction with the Eschmans and asked him to buy the note, and that after some negotiations and inquiry into the value of the collateral, he took over the note, paying Patterson $1,350.00 in cash, cancelling a debt of $2,150.00 which Patterson owed him, and agreeing to assume and cancel another debt

of $4,000.00, which Patterson owed another concern, in which the plaintiff was interested.

By statute a negotiable bill purchased for value before maturity is, in the hands of an innocent holder, not open to defenses on the part of the maker. The burden is upon the maker to show that the holder is not a bona fide holder for value in due course. This rule is, however, subject to this exception; If the maker pleads and introduces proof to show that the note was stolen or was procured by fraud and deceit as alleged in the answer, the burden then shifts to the holder of the note to show that he is a bona fide purchaser for value before maturity. Daniels Negotiable Instruments, Sec. 815; Randolph on Negotiable Paper, Sec. 1024, 1025, et seq.

[fol. 29] One cannot read the proof filed in this action without arriving at the conclusion that Patterson sought to practice a gross fraud upon the Eschmans in the sale of the stock in the magazine publishing corporation to E. A. Eschmann, and that he sought through the forms of law to make the fraud effective by taking a negotiable note and transferring it to others.

The proof shows that Patterson was hard pressed for money, that he was borrowing from his friends. He owed the plaintiff and others some $6,150.00, and the letters which passed betwen him and his business associate Waller, showed that the corporation owed $50,000.00, was in a hopeless failing condition in January, and February, 1911, and that they desired to sell out and realize what they could on the venture. The magazine instead of a circulation of 30,000 had but 1,400, and had failed to issue the December, January and February numbers.

Patterson had the note made payable to one Dunstan, a mysterious person whom he described as a divorced woman, met him in a New York Restaurant, for the purpose of endorsing the paper. After the note had been executed, Patterson hurried to Chicago (according to his testimony), taking the note to his intimate friend and creditor who kept the note, and did not disclose his interest in it until more than a year after its maturity. This friend, the plaintiff, paid him $1,350.00 in cash, and releases him from certain debts aggregating $6,150.00. The negotiation of the note is not the usual business transaction, nor such as the plaintiff usually engages in. When asked how the $1,350.00 was paid the plaintiff—business man—says that he took Patterson to his bank where he cashed a check for $1,350.00 and gave the proceeds to Patterson, but he did not have the cancelled check, because it was his habit to destroy such checks when returned to him by the bank. Plaintiff and Patterson are intimates, one making personal loans to the other and cashing his checks. For a year following the execution of the note, Patterson was constantly endeavoring to have Eschman pay the note, or renew it.

Patterson, and his former business associate, Waller, are untruthful under oath, as shown by their testimony upon cross-examination, touching the letters which passed between them in January and February, 1911, and as to the financial condition of the corporation.

Throughout the two depositions of Patterson is an apparent understanding between plaintiff's Chicago lawyer and Patterson, which is not altogether explained by the fact that he has heretofore been also [fol. 30] Patterson's legal adviser. We may lay aside the coincidence of counsel having both men for clients, but we may properly bear in mind the uninterrupted harmony between McKenzie and Patterson, and the zealous cooperation of both to wrest from the defendant the rewards of Patterson's fraud. This court cannot, under the circumstances, believe that McKenzie is a bona fide holder for value of the note, but does believe that he is a full partner with Patterson in the fraudulent scheme to enforce the payment of the note. In other words, and to state it in legal phraseology, plaintiff has not satisfactorily sustained the burden of proof.

A judgment will be entered dismissing the petition and also the counter claim of defendant Eschman, awarding the defendant F. W. R. Eschman, costs.

Exceptions reserved for plaintiff.

31st October, 1914.

Samuel B. Kirby, Judge.

In United States District Court

Exhibit in Evidence

Judgment of the Jefferson Circuit Court in Mackenzie v. Eschmann—Entered Nov. 7, 1914

At a Court Held on November 7, 1914

This action coming on to be heard and after oral argument being submitted on the pleadings, exhibits and proof, and the court being sufficiently advised, it is considered and adjudged by the court that the plaintiff recover nothing of the defendant, and that the petition of the plaintiff, Louis B. Mackenzie, be and it is hereby dismissed.

It is further considered and adjudged that the defendant, F. W. R. Eschmann, be and he is hereby permitted to withdraw from the papers in the case the certificate for 130 shares of the capital stock of [fol. 31] the A. Engelhard & Sons *So.* filed herein as an exhibit, leaving a copy thereof in the record.

It is further considered and adjudged that the counter-claim of the defendant, F. W. R. Eschmann, be and it is hereby dismissed, to which the defendant objects and excepts. It is further considered and adjudged that said F. W. R. Eschmann recover of the plaintiff, Louis B. Mackenzie, his costs herein expended for which he may have execution.

To all of which the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is granted.

IN UNITED STATES DISTRICT COURT

EXHIBIT IN EVIDENCE

MACKENZIE

v.

ESCHMANN'S EXECUTORS

(Decided March 6, 1917)

Appeal from Jefferson Circuit Court (Chancery Branch No. 2)

1. Bills and Notes—Joint Makers—Fraud—Waiver. Where one of the two joint makers of a promissory note, as a ground of defense, relies on the fraud practiced on the other makers, he is likewise bound by the other makers' conduct in waiving the fraud.

2. Bills and Notes—Fraud-Actions—Waiver. Where a party, with knowledge of the fact that a contract has been obtained by fraud, thereafter enjoys the fruits of the contract and repeatedly affirms the contract by other unequivocal acts, he thereby waives the fraud and cannot rely thereon as a defense.

3. Bills and Notes—Payment—Agency of Endorser—Evidence. In an action on a promissory note, evidence examined and held insufficient to show that an endorser was the holder's agent for the purpose of receiving payment on the note.

Clarence C. Smith, Keith L. Bullitt and King, Brower & Hurlbut, for Appellant.
R. A. McDowell, for Appellees.

Opinion of the Court by William Rogers Clay, Commissioner; Affirming on the Cross-appeal and Reversing on the Original Appeal

On July 25, 1911, F. W. R. Eschmann and E. A. Eschmann executed and delivered to E. F. Dunstan their promissory note, whereby they agreed to pay to the order of E. F. Dunstan, on or before thirty days after the date thereof, the sum of $7,500.00, with interest at the rate of six per cent per annum. The note was secured by 130 [fol. 32] shares of the capital stock of A. Englehard & Sons Company, a Louisville corporation. The note bears the endorsements of E. F. Dunstan and H. L. Patterson.

Claiming that he purchased the note for value and before maturity, plaintiff, Louis B. Mackenzie, brought this suit against F. W. R. and E. A. Eschmann, E. F. Dunstan, H. L. Patterson and A. Englehard & Sons Company, to recover judgment on the note and enforce his lien upon the collateral by which the note was secured.

The case went to trial as to F. W. R. Eschmann alone. During the progress of the case F. W. R. Eschmann died, and the action was revived in the name of his executors. On final hearing the chancellor dismissed the petition. From this judgment plaintiff appeals and F. W. R. Eschmann's executors prosecute a cross-appeal.

The note was executed under the following circumstances: H. L. Patterson was a large holder of stock in, and the chief officer of, the American Educational Company, a corporation engaged in the business of publishing a magazine known as "The American Educational Review." F. W. R. Eschmann and his son, E. A. Eschmann, resided in New York, where the son had been employed in the advertising department of "Hampton's Magazine." Young Eschmann had a friend by the name of Dingwall, who had also been soliciting advertisements for magazines. The two were anxious to get into business on their own account. During the spring of 1911 they met Patterson, who had recently opened a branch office in New York City. After several conferences, they agreed to purchase a controlling interest in the American Educational Company. As neither of the young men had any means, the elder Eschmann agreed to finance the arrangement for his son, and it is probable, though not certain, that the Eschmanns were also to assist Dingwall. As each of the parties gives a different version of the contract, it is not exactly clear how much money the elder Eschmann was to furnish, but the chancellor found, and the attendant circumstances support the conclusion, that the Eschmanns were to pay $15,000 cash and $10,000 in one year for a majority of the stock. Upon the payment of these sums the stock was to be delivered by Patterson.

As it was not convenient at the time for the elder Eschmann to meet the cash payment, the Eschmanns executed the note in question with the understanding that it was to be discounted by Patterson. Patterson claims that as he could not secure the money from the payee, E. F. Dunstan, he had Dunstan endorse the note and thereupon took it to Chicago and sold it to the plaintiff, Mackenzie. At [fol. 33] that time he was indebted to Mackenzie in the sum of $2,150, and to a third party in the sum of $4,000. Both he and Mackenzie testified that the consideration for the transfer was the release of Patterson's indebtedness to Mackenzie, the procuring of a release of the third party's claim for $4,000, and the payment to Patterson of $1,350 in cash. The transfer took place and the consideration was paid about August 10, 1911, and therefore, prior to the maturity of the note. Patterson says that he has at all times been ready to turn over the stock upon the payment by the Eschmanns of the contract price.

In addition to denying the allegations of the petition and amended petition, the elder Eschmann defended on the ground that E. F. Dunstan was a fictitious payee and his endorsement on the note was forged by Patterson; that the note was materially altered after its delivery; that it was executed without consideration and was obtained by fraud.

Without stating the evidence with reference to the first defense and without expressing any opinion as to its legal effect if it had been sustained, we deem it sufficient to say that it is not supported by the proof.

We are also convinced, by a careful examination of all the evidence bearing on the question, that the charge that the note was materially altered is not sustained.

On the issue of fraud, the evidence, in brief, is as follows: The younger Eschmann and Dingwall both say that Patterson represented to them that the magazine had a paid subscription list of from 32,000 to 35,000, and that Patterson subsequently admitted that the list did not exceed 7,000. E. A. Eschmann also says that Patterson stated that the magazine was in a flourishing condition. In the record there are letters from a former secretary and treasurer of the American Educational Company addressed to Patterson, in one of which the writer states that the corporation was about $50,000.00 in debt, and that there would be little left for the stockholders, unless they bought some scholarships or space at a discount and worked it out. These letters also show that the subscription list is very much less than that stated by Patterson. The statute provides that

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a [fol. 34] holder in due course." (Kentucky Statutes, section 3720b, subsection 59.)

Construing this section, it has been frequently held that where a maker shows that the execution of a note was induced by the fraud of the holder's transferror, the burden then shifts to the holder to show that he is a holder in due course. Muir v. Edelen, 156 Ky. 212; Barnard v. Napier, 167 Ky. 824. Here Mackenzie failed to testify that when he purchased the note he had no knowledge of the fraudulent representations alleged to have been made by Patterson. From the above evidence the chancellor concluded that the note in question was obtained by fraud, and as plaintiff did not rebut the prima facie case made out by defendant, he further held that plaintiff did not sustain the burden of showing that he was a holder in due course.

Whether the chancellor's finding of fraud is correct or not we deem it unnecessary to decide, for, even if its correctness be conceded, it seems to us that there is another feature in the case which makes the defense or fraud unavailable. It must be remembered that the executors of the elder Eschmann are not relying on fraud practiced directly on him, but upon fraud practiced upon his son. If, upon the one hand, they may rely upon fraud practiced upon the son, it likewise follows that they may be bound by the son's conduct in condoning or waiving the fraud. Misrepresentations of the circulation of "The American Educational Review" is the principal element of fraud relied on. Young Eschmann admits that "not very long after Mr. Patterson received the note" he obtained the information from

Patterson that the circulation of the magazine was not 32,000, but somewhere between 5,000 and 7,000. While he is not exactly certain as to the time, he says that he is sure that the information was imparted by Patterson in a conversation which occurred in the year 1911. On January 23, 1912, Dingwall executed to young Eschmann certain notes aggregating $5,200, which were endorsed by Eschmann and delivered to Patterson. In July, 1912, the two Eschmanns, Patterson and Dingwall, met at the office of Mr. Aplington, the elder Eschmann's attorney. Mr. Aplington's manner was such as to reflect on Patterson's good faith in the transaction. After Mr. Aplington left, the elder Eschmann apologized for Mr. Aplinton's attitude towards Patterson and said that they had no complaint to make of him, but they had found Patterson was fair and had done everything he [fol. 35] had agreed to do: After August 24, 1912, young Eschmann collected from Mrs. Houck the price of a scholarship, and kept the money under a claim of right to do so by virtue of his agreement with Patterson. It is the rule that a party to a contract obtained by fraud has but one election to repudiate or rescind the same. If he once determines his election, it is determined forever. Hence, if it is shown that he has at any time after knowledge of fraud, either by express words, or by unequivocal acts, affirmed the contract, his election is irrevocable. By clearly manifesting his intention to abide by the contract, he condones the fraud, and is without remedy. He cannot with knowledge of the fraud enjoy the benefits of the contract, and then file an action for deceit. Hartford Life Ins. Co. v. Hanlon, 139 Ky. 346; Smith v. Lewisport Bank, 27 R. 406. Here the younger Eschmann, after obtaining knowledge of the fraud, not only assured Patterson that he had acted in good faith, but endorsed notes for $5,200 for the purpose of carrying out the contract, and thereafter collected and retained money which he had no right to collect or retain except by virtue of the contract. Having, with knowledge of the fraud, enjoyed the fruits of the contract, and having repeatedly affirmed the contract by other unequivocal acts, he has thereby condoned the fraud and neither he nor his father's executors will now be permitted to rely on that defense.

It appears that a draft for $2,500 drawn by Patterson on E. A. Eschmann on September 7, 1911, was paid on September 19. E. A. Eschmann claims that he got this money from his father for the purpose of paying it on the note and sent it to Patterson with the understanding that it should be credited on the note. It is insisted on the cross-appeal that the executors are either entitled to recover this sum from plaintiff or to have the sum credited on the judgment, in case of a finding in favor of plaintiff. In reply to the first contention, it is sufficient to say that, in view of our conclusions on the main features of the case, there is no basis whatever for a judgment in favor of the executors for the sum mentioned. The only remaining question to be determined is whether the amount of the draft should be credited on the judgment in favor of plaintiff. In support of this contention it is argued that Patterson was plaintiff's agent for the purpose of collecting the note and that the payment to

Patterson was, in effect, a payment of plaintiff. Without passing on the question whether the evidence is sufficient to show that the money was collected by Patterson with the understanding that it should be credited on the note, it is sufficient to say that we fail to [fol. 36] find in the record any substantial basis for the claim that Patterson was in any sense plaintiff's agent in looking after the collection of the note. The evidence merely shows that plaintiff was looking to Patterson to see that the note was paid, because Patterson had discounted the note to plaintiff and was liable thereon as endorser. Since the payment was not made to plaintiff or his authorized agent, it follows that the judgment in favor of plaintiff should not be credited by the amount of the draft in question.

On the cross-appeal the judgment is affirmed.

On the original appeal the judgment is reversed and cause remanded, with directions to enter judgment in conformity with this opinion.

IN UNITED STATES DISTRICT COURT

EXHIBIT 1 IN EVIDENCE

JUDGMENT OF THE JEFFERSON CIRCUIT COURT IN MACKENZIE V. ESCHMANN—Entered October 31, 1917.

At a Court Held on the 31st Day of October, 1917

The mandate of the Court of Appeals of Kentucky ordering the reversal on the original appeal and the affirmance on the cross-appeal of the judgment entered herein on the 31st day of October, 1914, and ordering this cause to be remanded with directions to enter judgment in conformity with the opinion of the Court of Appeals, and said opinion having been filed herein, and it appearing that the original defendant, F. W. R. Eschmann, has died during the progress of the case and the action has been revived in the Court of Appeals in the name of his Executors, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, and this cause being now submitted for judgment pursuant to said opinion of the Court of Appeals, and the Court being advised, [fol. 37] it is now ordered and adjudged as follows:

1. The judgment rendered herein on the 31st day of October, 1914 is now vacated, set aside and held for naught.

2. The counter-claim filed herein by the defendant F. W. R. Eschmann, now deceased, is hereby dismissed and the plaintiff, Louis B. Mackenzie, do recover of the estate of F. W. R. Eschmann, deceased, and from the defendants Edgar A. Eschmann, and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased and out of any assets whatever found belonging to the estate of said F. W. R. Eschmann, deceased the sum of Seventy-five hundred ($7,500.00) Dollars, with interest at the rate of six per cent per

annum from June 25, 1911, until paid and the sum of $29.60, being the costs herein expended, for all of which he may have execution.

3. The plaintiff Louis B. Mackenzie has a lien upon certificate No. 24 of the Capital Stock of A. Engelhard & Sons Company, a corporation for 130 shares of the capital stock in said company and upon any certificate or certificates which have been, or may hereafter be, issued by A. Engelhard & Sons Company to the defendants Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said certificate No. 24, and has a lien upon said 130 shares of stock represented by said certificate, said lien being to secure the plaintiff in the payment of the debt evidence- hereby and his costs herein.

4. In order to satisfy the claim of the plaintiff herein, said shares of stock shall be sold on some Monday at or about the hour of 11:00 o'clock A. M. at the Court House door in the City of Louisville, Jefferson County, Kentucky, by public outcry to the highest and best bidder on the following terms to-wit: Cash.

The Commissioner is directed before making said sale, to advertise the time, place and terms thereof, together with a description of said property ordered to be sold and the amount to be raised by printed hand bills posted one at the Court House door in the City of Louisville, Jefferson County, Kentucky and one at three of the most public places in the vicinity of the place of sale for at least ten days preceding the day of sale and by three insertious in brief form in the Louisville Times for three consecutive days next preceding the day of sale. Said shares of stock shall be sold free of all liens and the proceeds of the sale shall be first applied toward the satisfaction of the debt, interest and costs of the plaintiff herein.

[fol. 38] 5. The defendants, Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, are hereby ordered and directed to return to this Court said certificate No. 24 for 130 shares of the capital stock of the A. Engelhard & Sons Company and to file the same with the papers of this case.

This judgment may be executed immediately.

This cause is retained upon the docket for the making of such further orders and judgments as to the Court may seem proper.

[Certificate under Act of Congress omitted by consent of parties.]

IN UNITED STATES DISTRICT COURT

EXHIBIT 2 IN EVIDENCE

Bill of Sale, Dated Dec. 7, 1918

This bill of sale, made and entered into this 7th day of December, 1918, between Edgar A. Eschmann and Bettina Eschmann, Execu-

tors of the estate of F. W. R. Eschmann, deceased; E. A. Eschmann, E. F. Dunstan; H. L. Patterson and A. Engelhard & Sons Co., a corporation;—parties of the first part, all by Eustace L. Williams, Commissioner of the Jefferson Circuit Court, and Louis B. Mackenzie, party of the second part,

Witnesseth:

That, whereas, on the 10th day of March, 1913, the said Louis B. Mackenzie instituted an action against F. W. R. Eschmann, and Others, No. 78411, in the Jefferson Circuit Court, Chancery Branch, Second Division; and, whereas, on April 8th, 1914, May 25th, 1914 and December 7th, 1914, respectively, Amended Petitions were filed in said cause;—wherein certain proceedings were had, and orders were made; and, among others, it was sought to sell free of all liens.

The following-described stock, to-wit:

[fol. 39] One Hundred and Thirty shares of the capital stock of A. Englehard & Sons Company, a corporation, evidenced by Certificate No. 24 or any Certificate or Certificates which have been, or may hereafter be, issued by A. Engelhard & Sons Company to the defendants Edgar A. Eschmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24.

And such proceedings were had in such cause that a Judgment was rendered in substance ordering the Commissioner of the Jefferson Circuit Court to sell at the Court House door on some Monday at about the hour of 11 o'clock A. M., the above described stock, and under that Judgment the Commissioner of said Court reported a sale thereof as of the 15th day of July, 1918, to the said Louis B. Mackenzie at the sum of $100.00 (One Hundred Dollars). Said bid and purchase-price ($100.00) being less than said purchaser's debt, interest and costs, was not demanded of, or paid, by said purchaser. Said Report of Sale was confirmed by said Court and the Commissioner was ordered on October 30th, 1918, to execute and deliver to the said Louis B. Mackenzie a Certificate or Bill of Sale evidencing the purchase of the 130 shares of the capital stock of the A. Engelhard & Sons Company hereinabove set out. All of which more at large appears by reference to said cause; which reference is now here made for greater certainty.

Now, therefore, in consideration of the premises, the undersigned, Eustace L. Williams, Commissioner of the Jefferson Circuit Court, for and on behalf of the parties of the first part, do- hereby convey to the second party hereto, Louis B. Mackenzie, the said 130 shares of the capital stock of the A. Engelhard & Sons Company hereinabove described and evidenced by Certificate No. 24, or by any certificate or certificates which may have been or may hereafter be issued by A. Engelhard & Sons Company to the defendants, Edgar A. Echmann and Bettina E. Eschmann, Executors of the estate of F. W. R. Eschmann, deceased, in lieu of said Certificate No. 24.

In testimony whereof, the said Williams, as Commissioner, has hereunto set his name and affixed his seal the day and year first within written.

[fol. 40] Examined and approved 7th day of December, 1918.
Eustace L. Williams, Commissioner Jefferson Circuit Court,
Per W. N. Caldwell, D. C. Saml. B. Kirby, Judge.

COMMONWEALTH OF KENTUCKY,
Jefferson Circuit Court:

At a court held for the Court aforesaid on the 7th day of December, 1918, came Eustace L. Williams, Commissioner, and produced in Court the within and foregoing Bill of Sale to Louis B. Mackenzie and executed and acknowledged the same as Commissioner for and on behalf of the First parties therein named to be their act and deed.

(Signed) Frank Dugan, Clerk Jefferson Circuit Court, By J. M. Hunt, D. C.

Stamped with $2.60 worth of stamps, marked "E. L. W., Com'r., 12/7/1918."

IN UNITED STATES DISTRICT COURT

CONSENT ORDER—Entered March 30, 1921

This day came the parties and by consent it is ordered

1. That the defendants' Amended Answer tendered herein October 11, 1920 be, and the same hereby is filed.

2. That the stipulation of agreed facts (with a copy of the opinion of Kirby J. in the Jefferson Circuit Court rendered October 31, 1914, attached thereto) is hereby filed.

[fol. 41] IN UNITED STATES DISTRICT COURT

OPINION—Filed April 23, 1921

At the outset of this litigation there was a motion made by the defendant to dismiss the bill, but upon grounds quite fully stated in our opinion of May 27th, 1920, we overruled that motion. It would avail nothing to restate the views then expressed, though we dealt there with what is yet important and to a large extent must control our decision now. However, the presentation made by the answer of the defendants and the stipulation as to all the applicable facts appropriately call for some additional suggestions in order to a clear understanding of the whole case as now presented on final hearing.

The fundamental reason for overruling the motion to dismiss the bill was that the corporation of A. Engelhard & Sons Company had, by reason of being a party to the action in the Jefferson Circuit Court, not only been given notice of the claims of the plaintiff made in that action, but were thereby afforded positive knowledge of plaintiff's claim and of the pledge to him of 130 shares of the defendant's capital stock represented by Certificate 24. It also furnished positive knowledge to the defendant that the claim to those shares and no other was to be adjudicated in that case. Possibly that knowledge may be said to have been somewhat emphasized by the fact that F. W. R. Eschmann, the pledgor of the 130 shares to the plaintiff, was at the time a brother-in-law of the president of the defendant.

In the stipulation of facts filed of record there are, among others, the following statements:

"(a) To R. A. McDowell, in payment of his fee in said suit, 25 shares, which were later sold by McDowell for $2,500.00 cash, and transferred to V. H. Engelhard by R. A. McDowell. R. A. McDowell was the attorney of record for the defendants, F. W. R. Eschmann, Edgar A. Eschmann, and A. Engelhard & Sons Company, in cause #78,411, in the Jefferson Circuit Court, Kentucky, and on the appeal of said cause to the Court of Appeals of Kentucky, was attorney of record for Bettina E. Eschmann and Edgar A. Eschmann, as Executrix and Executor respectively, of the estate of F. W. R. Eschmann, deceased.

V. H. Engelhard was a brother of Mrs. F. W. R. Eschmann, and on December 10, 1912, and thereafter, until the date of his death, to wit: (subsequent date of transfer of the 25 shares of the capital stock of A. Engelhard & Sons Company from R. A. McDowell to said V. H. Engelhard), the president and the executive head of said [fol. 42] A. Engelhard & Sons Company, and was the person on whom the demand mentioned in Paragraph 3, supra, was made on December 10, 1912.

(b) To Bettina E. Eschmann, 105 shares which stand on the books in her name today (issued in two certificates, one for 40 shares and one for 65 shares). Said Bettina E. Eschmann was, at the date of said transfer, the wife of F. W. R. Eschmann, and now is executrix of the estate of F. W. R. Eschmann, deceased.

F. W. R. Eschmann and Bettina E. Eschmann were on December 10, 1912, husband and wife, living together as such, and so continued until the death of F. W. R. Eschmann which occurred on or about April 26th, 1915. The fact of said relationship to each other and living together of said F. W. R. Eschmann and Bettina E. Eschmann during the period aforesaid was known to V. H. Engelhard."

All of the persons who got portions of the 130 shares of the defendant's capital stock when Certificate #24 was "split up" may have confidently thought that the early action of the State court sustaining the demurrer of A. Engelhard & Sons Company to the

petition therein pending would prevent any further trouble as to those shares, and they may all have been confident that that action of the State court would be approved upon appeal, but that confidence or assumption or belief would not, as matter of law, relieve them of any obligation in respect to that 130 shares which might be made clear by any reversal of the judgment of the Jefferson Circuit Court.

Prima facie it made no difference to the defendant corporation what individuals became the holders of its capital stock, and that particular question was not of itself of any special moment to it, but it was a matter of prime importance to the defendant as to whether it should wrongfully and with such knowledge of the facts, issue certificates for that 130 shares of stock to others than those who might ultimately be held by the State courts to be entitled to it.

Especially can not the defendant very persuasively urge the argument necessary to support its contention when this stock was used first to pay to the attorney a $2,500 fee in that litigation and when the other 105 of the 130 shares were delivered to other persons who were of kin to the president of the Company. Those things, per se, might not have been in any way wrong, but they seem to have presented a temptation to speedy action in order to set up a barrier to plaintiff's claim.

The argument of counsel for the defendant appears to go outside [fol. 43] of the concrete situation now presenting itself, inasmuch as the cases cited by him, though probably abstractly correct, do not deal with a case like this, where superseding the judgment by plaintiff was not important in view of other facts which affect the defendant corporation in its relations to all concerned, including the plaintiff.

The fact that the judgment was not superseded did not in any way alter the obligation of the defendant to see to it that the 130 shares of stock evidenced by Certificate #24 should be kept in condition to meet any duty or obligation devolving on the corporation when final judgment should ultimately be rendered by the State courts, and as the mere distributor of certificates of the stock to those entitled, defendant should have kept the situation intact, so as to meet the requirements of any judgment in the litigation in the State court. And for its own safety it might have demanded indemnity before it acted.

Prima facie, as we have said, it was a matter of indifference to the defendant corporation as to who should hold the title to its stock, but if, having notice of the facts, it participated (as was done here) in the giving of certificates of that stock to persons other than those who were entitled thereto, it could not thereby deprive plaintiff of his rights to the stock in the corporation.

In short, under the circumstances, the defendant having full notice of the facts, it was its duty not to transfer that stock to anybody except under the judgment of the court. Until that judgment was finally rendered it was its duty, as well as its right, to preserve the status so that it might be able to meet the requirements of whatever

judgment might be rendered. Its failure to do that subjects it to a liability to the plaintiff, and the fact that the fee of Mr. McDowell was due from whoever employed him did not support a conclusion that that fee could be paid out of stock ultimately to be adjudged to be owned by some other stockholder than the debtors of the attorney.

Another clause in the stipulation of facts is in the words:

"F. W. R. Eschmann nowhere recorded any transfer or assignment of said 105 shares of stock of A. Engelhard & Sons Company to Bettina E. Eschmann, except on the corporate books of A. Engelhard & Sons Company."

It is urged by plaintiff that one provision of Section 2128 of the Kentucky Statutes is important in this connection. That provision reads as follows:

[fol. 44] "A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded; but the recording of any such writing shall not make valid any such gift, transfer or assignment which is fraudulent or voidable as to creditors or purchasers."

It may be that these provisions should also be given force, but the court prefers to put its decision upon the grounds stated.

It seems to us clear, therefore, that the plaintiff is entitled to relief, but whether that relief shall be the value of the stock at the time this suit was brought or later, or whether the measure of damages to be recovered against the defendant will be $7,500 with interest from the date of the maturity of the note, that being the amount for the payment of which the stock was pledged, are questions which should be considered in fixing the proper amount, and, unless counsel can agree, the court will hear testimony as to the value of the 130 shares of stock of the defendant Company as of the date of bringing this action, or as to the date of the failure to issue certificates of stock after the sale to the plaintiff.

Walter Evans, Judge. April 23rd, 1921.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL STIPULATION OF AGREED FACTS—Filed April 29, 1921

It is agreed between the parties hereto, as follows, to-wit:

1. The reasonable market value of shares of the capital stock of A. Engelhard & Sons Co. was One Hundred and Thirty ($130.00) Dollars per share on each of the dates mentioned in the pleadings herein.

[fol. 45] 2. A. Engelhard & Sons Company have declared and paid the following dividends upon its capital stock out of earnings, to-wit:

For preceding Fiscal year, November 30, 1918, 25 per cent.
" " " " November 30, 1919, 18 per cent.
" " " " November 30, 1920, None.
(Business showed loss.)

The capital stock of the A. Engelhard & Sons Co. was during 1918 and 1919 One Hundred and One Thousand ($101,000.00) Dollars per value, and in 1920 was increased to One Hundred and Twelve Thousand ($112,000.00) Dollars par value.

Wm. Marshall Bullitt, Attorney for Plaintiff. R. A. McDowell, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

OPINION—Filed April 29, 1921

The opinion of the court delivered herein on the 23rd inst. left open the question of the measure of damages for further argument. This has been had, and the court is of opinion that the fundamental basis for plaintiff's recovery was the knowledge the defendant had of his claim, which claim may be stated thus: On July 25th, 1911, a note was executed by F. W. R. Eschmann to E. F. Dunstan which was secured by a pledge to Dunstan of 130 shares of the capital stock of defendant corporation. This note was for $7,500, and bore interest from its date. It was endorsed and transferred by Dunstan to the plaintiff who brought this action. In doing this he gave the defendant not only notice, but full knowledge of his title, not indeed as the owner but as the pledgee of the stock to secure the note. It was because defendant knew these facts that we have held that the plaintiff is entitled to have a proper judgment against defendant in this action.

[fol. 46] It has been this day stipulated in writing between the parties that under a judgment of the State court in the case referred to in the pleadings there was a sale of the pledged stock, and that as a result on December 7th, 1918, a judicial bill of sale to the 130 shares of stock was executed and delivered to plaintiff.

It has been stipulated in writing filed that on November 30th, 1919, a dividend of 18 per cent had been declared and paid by the defendant on the 130 shares. This dividend amounted to $2,340, which should bear interest from the date of payment. It was also stipulated that no dividend on defendant's capital stock had been declared or paid since that time, though it is also stipulated that on November 30th, 1918, a dividend of 25 per cent had been declared and paid on its stock including the 130 shares herein referred to, and furthermore that this 25 per cent was paid out of the earnings of the year ended November 30th, 1918. But it will be noticed that

the last named dividend was declared and paid before plaintiff was invested with the legal title to the 130 shares of stock.

In this situation what shall the court do? After careful consideration we have concluded that the plaintiff is entitled to recover $7,500 with interest thereon from July 25th, 1911, to December 7th, 1918, the total amount thereof being $10,816.25, and that in addition thereto the plaintiff is entitled to recover the amount of the dividend declared and paid November 30th, 1919. As that dividend was 18 per cent it makes an additional amount, including interest thereon from the date of payment to this time, to be recovered by the plaintiff of $2,538.50.

The judgment of the court will be that the plaintiff is entitled to recover from the defendant the sum of $13,354.75 with interest thereon from this date until paid.

Walter Evans, Judge. April 29th, 1921.

[fol. 47] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed April 29, 1921

This action coming on for further hearing the arguments of counsel were again heard, and thereupon consideration thereof the court delivered a further opinion thereon, which is filed, and pursuant thereto and to the opinion delivered on April 23rd, 1921, it is now ordered, adjudged and decreed by the court that the plaintiff, Louis B. Mackenzie, do have and recover of the defendant, A. Engelhard & Sons Company the sum of Thirteen thousand three hundred and fifty-four and 75/100 ($13.354.75) dollars, with interest thereon from this date until paid and his costs herein expended, as the same may properly be taxed by the Clerk, and plaintiff may have execution thereon in due course.

It is further ordered, adjudged and decreed that upon the payment of the sums herein adjudged, the plaintiff will have no further claim to nor interest in the 130 shares of stock in the defendant Company described in the pleadings.

Walter Evans, Judge. Enter April 29, 1921.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS BY LOUIS B. MACKENZIE—Filed May 4, 1921

The plaintiff, Louis B. Mackenzie, files this, his Assignment of Errors, to wit:

1. The Court erred in refusing to decree that the defendant, A. Engelhard & Sons Co. should issue and deliver to the plaintiff, Louis B. Mackenzie, a certificate of stock certifying that Louis B. Macken-

zie is the owner of 130 shares of the capital stock of the A. Engelhard & Sons Co.

2. The Court erred in refusing to enter a decree in favor of the plaintiff, Louis B. Mackenzie for the full value of the said 130 shares [fol. 48] of stock at the stipulated value thereof, to wit: One Hundred and Thirty ($130) Dollars per share, plus the two dividends heretofore declared thereon, to wit: 25 per cent dividend on November 30, 1918, and 18 per cent dividend on November 30, 1919, with 6 per cent interest thereon from the respective dates of such declaration of said dividends.

3. The Court erred in adjudging that the plaintiff, Louis B. Mackenzie should have no further interest in the 130 shares of stock in controversy if and when the defendant should pay to said plaintiff Thirteen Thousand Three Hundred and Fifty-four Dollars and Seventy-five Cents ($13,354.75), with interest from the date of the entry of the decree.

Wm. Marshall Bullitt, Counsel for Louis B. Mackenzie.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS BY A. ENGELHARDT & SONS CO.—Filed May 4, 1921

The defendant, A. Engelhard & Sons Co., files this, its Assignment of Errors, to wit:

1. The Court erred in failing and refusing to dismiss the plaintiff's Bill in Equity herein.

2. The Court erred in holding that the plaintiff, Louis B. Mackenzie, was entitled to recover from the defendant the sum of Thirteen Thousand Three Hundred and Fifty-four Dollars and Seventy-five Cents ($13,354.75), with interest from April 29, 1921, or any sum.

3. The Court erred in holding that Louis B. Mackenzie was entitled to recover from the A. Engelhard & Sons Co. the sum of Seventy-five Hundred ($7,500) Dollars, with interest from July 25, 1911 to December 7, 1918, or any part thereof.

4. The Court erred in holding that Louis B. Mackenzie was entitled to recover Twenty-three Hundred and Forty ($2,340.00) Dol- [fol. 49] lars on account of a dividend declared on November 30, 1919, or any part thereof or any interest thereon.

R. A. McDowell, Counsel for A. Engelhard & Sons Co.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEALS—Entered May 4, 1921

This day came the plaintiff, Louis B. Mackenzie, by Wm. Marshall Bullitt, Attorney, and the defendant, A. Engelhard & Sons Co., by R. A. McDowell, Attorney, and the plaintiff and defendant each respectively presents his or its Petition for Appeal, Assignment of Errors, and Appeal Bond, praying for an appeal from the final decree herein to the United States Circuit Court of Appeals for the Sixth Circuit, and

It is ordered that each of said bonds be, and the same hereby is approved, and that the Assignments of Error and Petitions for Appeal be each respectively filed, and that the respective appeals of the plaintiff and the defendant to the United States Circuit Court of Appeals for the Sixth Circuit be, and the same hereby are respectively granted.

Walter Evans, Judge.

[fol. 50] IN UNITED STATES DISTRICT COURT

STIPULATION—Filed May 4, 1921

It is agreed between the plaintiff and defendant, as follows, towit:

1. The respective appeals of Louis B. Mackenzie and of A. Engelhard & Sons Co. having each been duly applied for, allowed, and appeal bonds executed and approved, there shall be omitted from the printed transcript on appeal, the respective petitions for appeal and appeal bonds.

Louis B. Mackenzie and A. Engelhard & Sons Co. by their respective counsel each expressly waived the issuance of a citation and each respectively entered its appearance to the appeals herein allowed to the United States Circuit Court of Appeals for the Sixth Circuit.

2. This printed transcript has been jointly prepared by Counsel; and the Clerk of the United States District Court for the Western District of Kentucky is hereby authorized and directed to consider such printed transcript as the transcript on appeal herein, and to certify and transmit such printed transcript to the United States Circuit Court of Appeals for the Sixth Circuit.

This stipulation shall serve as the præcipe.

Wm. Marshall Bullitt, Counsel for Plaintiff. R. A. McDowell, Counsel for Defendant.

The foregoing stipulation of facts, the exhibits filed therewith and stipulation of counsel reducing the record has been examined, and is hereby approved.

Walter Evans, District Judge.

[fols. 51 & 52] In United States District Court

Clerk's Certificate

I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of 50 pages, constitutes a full, true and correct transcript of all that portion of the record and proceedings had in said Court in a certain cause entitled Louis B. Mackenzie, Plaintiff, v. A. Engelhard & Sons Co., Defendant, and required to be copied herein in ac-ordance with the stipulation of Counsel on file and copied herein, as the same appears of record and on file in my said office.

Witness my hand and official seal of said Court, this 10 day of May, 1921.

A. G. Ronald, Clerk.

[fol. 53] Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit

Appearance of Counsel for Appellant—Filed May 13, 1921

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the appellant.

Wm. Marshall Bullitt.

Appearance of Counsel for Cross-appellant—Filed May 13, 1921

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the cross-appellant.

R. A. McDowell, Attorney for A. Englehard & Sons Co.

Cause Argued in Part

Before Knappen, Denison, and Donahue, C. JJ.

November 8, 1922.

These causes are argued together by Mr. William Marshall Bullitt on behalf of Louis B. Mackenzie and by Mr. R. A. McDowell on behalf of A. Englehard & Sons Co. and are continued until tomorrow for further argument.

[fol. 54] FURTHER ARGUED AND SUBMITTED

November 9, 1922

These causes are further argued by Mr. R. A. McDowell on behalf of the A. Englehard & Sons Company and by Mr. William Marshall Bullitt on behalf of Louis B. Mackenzie and are submitted to the Court.

IN U. S. CIRCUIT COURT OF APPEALS

DECREE IN #3581—Filed Feb. 6, 1923

Appeal from the District Court of the United States for the Western District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby modified and the cause remanded for entry of a new decree in accordance with the opinion of this Court. No costs in this Court are awarded.

IN U. S. CIRCUIT COURT OF APPEALS

DECREE IN #3582—Filed Feb. 6, 1923

Appeal from the District Court of the United States for the Western District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby modified and the cause remanded for entry of a new decree in accordance with the opinion of this Court. Appellant will recover the costs of this Court.

[fol. 55] UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

[Title omitted]

Before Knappen, Denison and Donahue, Circuit Judges

OPINION—Filed Feb. 6, 1923

Eschmann owned 130 shares of stock in the Engelhard Company,—a Kentucky corporation (hereafter called the Company). He became surety upon a note for $75,000, and he delivered to the payee, as collateral security, the certificate for this stock. Mackenzie later purchase this note. It provided for a lien upon the stock by way of security, but the certificate was not endorsed in blank or otherwise by Eschmann. Thereafter Mackenzie brought suit in a Kentucky equity court to collect his debt against Eschmann, and to foreclose his lien upon the stock. He filed the certificate in the court as an exhibit to his complaint. Eschmann defended on the ground that he had been defrauded into giving the note and that Mackenzie was not a good faith purchaser. The chancellor sustained this defense, and the decree in Eschmann's favor included a provision that he might withdraw the certificate from the court files. Mackenzie promptly appealed, but did not take the steps necessary to supersede the decree. Accordingly Esch-
[fol. 56] mann withdrew the certificate, surrendered it, and the Company issued two new certificates in place thereof—one for 105 shares to Eschmann's wife and one for 25 shares to his attorney. The Company and its president had full knowledge of Mackenzie's claim and of the pending suit, and it is not shown that either the attorney or the wife was a purchaser without notice. Shortly thereafter the 25 shares were transferred and reissued to Mr. Engelhard, the president of the corporation. In due course the appeal was heard, and the Court of Appeals decided that Mackenzie was a good faith purchaser. Accordingly it reversed the decree, sustained the lien upon the stock, directed that Mackenzie should have judgment for his debt and that his lien should be enforced by a sale of the stock. The chancery court thereupon entered judgment and an order of sale. The sale was had before a commissioner, and the stock was bid in by Mackenzie, but the attorney for the Eschmann-Engelhard interests gave notice at the sale that nothing would pass, and so it was bid in for a nominal price. The sale was duly confirmed and the commissioner ordered to execute an efficient bill of sale or transfer, and he did so. Mackenzie presented to the Company the bill of sale and demanded a certificate for the 130 shares. The Company refused, on the ground that valid certificates for this stock were outstanding and it could not over-issue its capital stock. Mackenzie thereupon brought this suit upon the equity side of the court below, asking that the Company be required to issue this certificate to him, or, in the alternative, that he have judgment against the Company for the value of this stock (which value was stipulated),

and for the dividends paid to Mrs. Eschmann and Engelhard since Mackenzie's foreclosure purchase. The court below held that Mackenzie was entitled to a judgment against the Company for the amount of his lien, with interest, and for the dividends which had been paid out of the earnings which had accrued subsequent to Mackenzie's purchase, but denied further relief. Both parties appeal. Mackenzie complains that he should have had either the certificate or its full value, and also all dividends declared after its purchase; the Company complains that any decree was rendered against it.

DENISON, Circuit Judge: We have no doubt that in spite of the withdrawal of the certificate from the court files, the state court re-[fol. 57] tained jurisdiction over the subject matter sufficiently to decree a foreclosure sale valid as between the parties; and, for the purpose of this opinion, and without undertaking to decide the questions involved, we assume that the foreclosure of the lien upon the stock was so completely valid that as against both Eschmann and purchasers pendente lite Mackenzie acquired the legal title to the stock, and that in an action at law against the corporation for its refusal to reissue the stock to him, he would be entitled to recover full damages. Mackenzie has not brought such an action. He has applied to a court of equity for what would be, in effect, a mandatory injunction compelling the issuing of the stock certificate to him and asking in the alternative that if a new certificate can not be lawfully issued to him, the value of the stock should be ascertained and the Company directed to pay him that value. His primary effort is to get the specific article, the stock, which on account of prospective earnings, or voting power, may seem worth to him much more than its market value. It is fundamental that a plaintiff who does not rely upon his strict legal rights but asks special relief from a court of equity, subjects himself to the equitable discretion of that court, and may be denied some measure of his legal rights if to grant them all would be distinctly inequitable. We think this case is one for the application of this principle, and this for reasons which depend upon the peculiar facts of the case, and which we proceed to develop.

The surrender and reissue of the certificate did not occur under circumstances which made the act wrongful as against Mackenzie in the manner and degree to which such an act is ordinarily wrongful as against the true owner. On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificates, he contributed to create the situation attending the withdrawal, surrender and reissue. To obtain a supersedeas would apparently have been no burden and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated ab initio when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the customary precautions to preserve his interests.

In any event, and even if Mackenzie had retained possession of the certificate, but lacking legal title thereto, Eschmann would have

been entitled to surrender and require reissue thereof to his nominees, provided the security interest of Mackenzie was protected. In view of the pending litigation as to the existence of Mackenzie's interest, [fol. 58] and the undisputed existence of substantial interest in Eschmann, it would seem that a court would have compelled the issue of a new certificate to Eschmann's nominees, if that certificate should have had endorsed upon it a memorandum that it was subject to whatever lien Mackenzie might establish. The wrong done to Mackenzie was therefore the issuing of the new certificate in such a way that it might reach a bona fide purchaser and so perhaps cut off Mackenzie's lien, but the wrong did not extend to the entire value of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien.

In this situation the parties came to the foreclosure sale of the stock. Its value was $17,000; the lien was about $10,000. It was quite evident that no sale could be had at which any fair value could be realized. No counsel would undertake to advise with certainty what title would pass. The books of the corporation showed no interest to sell. No stranger would pay a substantial price, because he would be buying only a law suit. Eschmann and his vendees would not bid, because they were advised and doubtless in good faith believed that no title would pass. The actual result was inevitable, viz., that Mackenzie would buy in the $17,000 of stock for a nominal price (he paid $100) and still leave his whole claim against Eschmann for the debt practically unimpaired. This would be and was a grossly inequitable result. The situation could have been easily clarified, and it was Mackenzie's duty to procure that clarification before going to sale, if he expected to seek the aid of a court of equity in enforcing his rights as purchaser. An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers pendente lite, just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equitable enforcement remedies could have been asked without embarrassment.

In the strongest light in which the situation could be stated for plaintiff, it would be as if the reissued certificates had borne, in words, the qualification that they were subject to Mackenzie's interest, and by assuming that, even then, a foreclosure sale would absolutely cut off the title, not only of the parties but of all who had purchased since the suit was commenced, and hence, that there could [fol. 59] have been no equitable obligation to clear up the title before proceeding to sale. However, such a statement does not meet the full facts. In no such ordinary foreclosure would it appear that steps had been taken, pursuant to the decree against plaintiff and while unreversed, and under which new parties had become entitled to be heard as to whether their title was cut off— in other words, as to whether they were purchasers pendente lite within the meaning of that phrase in the rule which puts such purchasers in the position of their vendors.

The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules.

We therefore conclude that as against the corporation, which in some measure represents its stockholders of record, and for the purpose of the decree which the court below, sitting in equity, ought to have rendered, it must be considered that at the time of plaintiff's demand upon the corporation for a transfer of stock, he had only a lien for his debt and interest, so that his measure of damages against the corporation in this equitable proceeding should be limited to the amount necessary to discharge such lien. The lien would, we think, include the costs of the state court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter.

Defendant has interposed no claim that a court of equity was without jurisdiction because the remedy at law was adequate; and there is, to say the least, no such clear lack of jurisdiction that the court should raise that question.

The fact that the relief given turns out to be a money judgment only, does not necessarily control; nor yet the fact that, though plaintiff appealed to a court of equity to get more than strict legal rights, he gets less than they would have been if, as we have assumed merely for the purposes of this opinion, the full legal title passed by the sale.

It is urged that even though there was a wrong done to plaintiff by the transfer and reisue of the stock without saving his lien, yet that no damage has resulted to him, because the lien still exists, as against purchasers with knowledge, and that it is plaintiff's duty to pursue the purchasers, bring them into court, and enforce his lien, [fol. 60] unless they can prevail against him. As an original proposition, this would be forceful but, to the majority of the court, the contrary seems to be settled. Whether the corporation is held as for a conversion, or on the ground of negligence as a trustee, it is liable to the rightful owner in damages, and he is not obliged to pursue the purchaser. Telegraph Co. v. Davenport, 97 U. S. 369, 371; St. Romes v. Cotton Press Co., 127 U. S. 614, 620.

The decree must be set aside and the case remanded for the entry of a new decree in accordance with this opinion, with costs to the Company.

In U. S. Circuit Court of Appeals

Agreement to Stay Mandate—Filed March 6, 1923

By agreement the time for the issuance of the mandate herein is extended for 30 days in order to give the parties time to file petitions for writs of certiorari.

Wm. Marshall Bullitt, Attorney for Louis B. Mackenzie. R. A. McDowell, Attorney for A. Englehard & Sons Co.

IN U. S. CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATES—Filed Mar. 7, 1923

Ordered, that motions to stay mandates herein pending applications to the Supreme Court for writs of certiorari, is hereby granted subject to the following condition: that appellant and cross-appellant shall within 30 days from the date of this order file their petitions for the writs in the Supreme Court and, upon giving notice to opposing counsel of date for submission as required by Supreme Court Rule 37, present the petitions in open court on the first motion day thereafter; unless this condition is complied with, or its non-observance sanctioned by the Supreme Court, the mandates herein will issue but in the event of compliance with the condition imposed or of such sanctioned non-observance the mandates will be stayed until final action in the cases is taken by the Supreme Court.

[fol. 61] ORDER EXTENDING TIME TO STAY MANDATE—Filed April 5, 1923

By agreement the time for issuance of the mandate herein is extended for 30 days additional and until May 5th, 1923, in order to give the parties time to file petitions for writs of certiorari.

Wm. Marshall Bullitt, Attorney for Louis B. Mackenzie. R. A. McDowell, Attorney for A. Englehard & Sons Co.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLERK'S CERTIFICATE

I, Arthur B. Mussmann, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Louis B. Markenzie vs. A. Englehard & Sons Company and A. Englehard & Sons Company vs. Louis B. Mackenzie. Nos. 3581-3582, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 19th day of April, A. D. 1923.

Arthur B. Mussmann, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. (Seal of United States Circuit Court of Appeals, Sixth Circuit.)

[fol. 62] WRIT OF CERTIORARI AND RETURN—Filed July 11, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Louis B. Mackenzie is appellant, and A. Engelhard & Sons Company is appellee, No. 3581, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the [fols. 63–65] United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, ss.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 5th day of July, A. D., 1923, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

[Title omitted]

STIPULATION

It is hereby stipulated by counsel for the foregoing parties that the transcript of record already on file in the Supreme Court of the

United States filed therein on the application for a writ of certiorari shall be taken as the return to the writ herein.

A. Englehard & Sons Company, By R. A. McDowell, Counsel.
Louis B. Mackenzie, By Wm. Marshall Bullitt, Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official signature and the seal of said Circuit Court of Appeals at the city of Cincinnati in said circuit this 9th day of July, A. D., 1923.

Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

[File endorsements omitted.]

[fol. 66] WRIT OF CERTIORARI AND RETURN—Filed July 7, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which A. Engelhard & Sons Company is appellant, and Louis B. Mackenzie is appellee, No. 3582, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the [fol. 67] United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, ss.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled

case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 5th day of July, A. D., 1923, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

[Title omitted]

STIPULATION

It is hereby stipulated by counsel for the foregoing parties that the transcript of record already on file in the Supreme Court of the United States filed therein on the application for a writ of certiorari shall be taken as the return to the writ herein.

A. Englehard & Sons Company, By R. A. McDowell, Counsel.
Louis B. Mackenzie, By Wm. Marshall Bullitt, Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official signature and the seal of said Circuit Court of Appeals at the city of Cincinnati in said circuit this 5th day of July A. D. 1923.

Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

[fols. 68 & 69] [File endorsements omitted.]